Supreme Court, U.S.
FILED

No. 09- 09-920 FEB 1-2010

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IN THE
Supreme Court of the United States

PAUL SIMMONS; PEDRO VALENTIN;
DENNIS BELDOTTI,

Petitioners,

v.

WILLIAM FRANCIS GALVIN,
in his capacity as Secretary of the
Commonwealth of Massachusetts,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Section 2 of the Voting Rights Act of 1965 ("VRA"), 42 U.S.C. 1973, apply to state felon disenfranchisement laws that result in discrimination on the basis of race?

2. Does the Massachusetts felon disenfranchisement scheme established in 2000 violate the Ex Post Facto Clause of the United States Constitution as applied to those Massachusetts felons who were incarcerated and yet had the right to vote prior to 2000?

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OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 575 F.3d 24 (1st Cir. 2009). (*See* Appendix ("App.") A.) The First Circuit affirmed in part and reversed in part the August 30, 2007 decision of the United States District Court for the District of Massachusetts, reported at 652 F. Supp. 2d 83 (D. Mass. 2007). (*See* App. B.)

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The First Circuit's opinion was rendered on July 31, 2009. (*See* App. A.) The Petition for Panel Rehearing and Rehearing En Banc was denied on September 2, 2009. (*See* App. C.) On November 25, 2009, Justice Breyer granted Petitioners an extension of time within which to file a petition for writ of certiorari to and including January 30, 2010.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Title 42 United States Code, Section 1973.

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b (f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Massachusetts Constitution, amend. art. 3.

Every citizen of eighteen years of age and upwards, excepting persons who are incarcerated in a correctional facility due to a felony conviction, and excepting persons under guardianship and persons temporarily or permanently disqualified by law because or corrupt practices in respect to elections who shall have resided within the town or district in which he may claim a right to vote, six calendar months next preceding any election of governor, lieutenant governor, senators or representatives, shall have a right to vote in

such election of governor, lieutenant governor, senators and representatives; and no other person shall be entitled to vote in such election.

Massachusetts General Laws, Chapter 51, Section 1 (as amended by Massachusetts Statute 2001, Chapter 150).

Qualifications of voters. Every citizen eighteen years of age or older, not being a person under guardianship or incarcerated in a correctional facility due to a felony conviction, and not being temporarily or permanently disqualified by law because of corrupt practices in respect to elections, who is a resident in the city or town where he claims the right to vote at the time he registers, and who has complied with the requirements of this chapter, may have his name entered on the list of voters in such city or town, and may vote therein in any such election, or except insofar as restricted in any town in which a representative town meeting form of government has been established, in any meeting held for the transaction of town affairs. Notwithstanding any special law to the contrary, every such citizen who resides within the boundaries of any district, as defined in section one A of chapter forty-one, may vote for district officers and in any district meeting thereof, and no other person may so vote. A person otherwise qualified to vote for national or state officers shall not, by reason of a change of residence within the commonwealth,

be disqualified from voting for such national or state officers in the city or town from which he has removed his residence until the expiration of 6 months from such removal.

United States Constitution, Amendment Fourteen.

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the

basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

United States Constitution, Amendment Fifteen.

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

United States Constitution, Article I.

Section 10, Clause 1. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

STATEMENT OF THE CASE

1. Each of the named Petitioners in this case is a Massachusetts resident currently incarcerated in a Massachusetts correctional institution for a felony or felonies committed prior to December 6, 2000. Paul Simmons is African-American; Pedro Valentin is Hispanic-American; Dennis Beldotti is Caucasian-American.

Prior to that date, Massachusetts was one of only three states, along with Maine and Vermont, that permitted incarcerated felons to vote. Several Massachusetts lawmakers had tried for years to end that distinction. Beginning in 1988, bills were introduced that would have amended the state constitution to disenfranchise various classes of felons and/or incarcerated persons. These bills, as well as subsequent iterations thereof, were repeatedly defeated. On July 28, 1997, however, Lieutenant Governor Argeo Paul Cellucci was elevated to Acting Governor upon the resignation of Governor William F. Weld. On August 2, 1997, in response to reports that Massachusetts prisoners were planning to form their own political action committee, Cellucci announced plans to file a measure that would prohibit all current and future inmates in Massachusetts prisons from casting a ballot. At a news conference, Cellucci explained the purpose behind his proposal, stating that "[p]rison is supposed to mean punishment, not some opportunity to form a political group." (App. B. at 114a.) On August 12, 1997, Cellucci sent the Massachusetts Senate and House of Representatives a proposed amendment to the state constitution applicable to all persons incarcerated on

account of a criminal conviction. On the day Cellucci submitted the amendment, his spokesman stated that Cellucci believed that "[p]risons are a place for punishment." (App. A. at 42a.) Boston newspapers published these statements to the Massachusetts public.

Two consecutive joint sessions of the Massachusetts legislature passed a provision that was in large part identical to Cellucci's proposed amendment.[1] This provision, known as Article 120, was then ratified by Massachusetts voters in the 2000 state election. The tabulation of the vote occurred on December 6, 2000, meaning that Article 120 took effect on that day. As a result of Article 120's passage, Article 3 of the Massachusetts Constitution now reads:

> Every citizen of eighteen years of age an upwards, *excepting persons who are incarcerated in a correctional facility due to a felony conviction*, and excepting persons under guardianship and persons temporarily or permanently disqualified by law because or corrupt practices in respect to elections who shall have resided within the town or district in which he may claim a right to vote, six calendar months next preceding any election of governor, lieutenant governor, senators or representatives, shall have a right to vote in such election of governor, lieutenant governor,

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1. Under Massachusetts law, a petition for a constitutional amendment must receive the support of at least 25% of two successively elected legislatures (joint sessions of both the House and Senate) before being put on the popular ballot.

> senators and representatives; and no other person shall be entitled to vote in such election.

Mass. Const. art. 3 (emphasis added).

In 2001, the Massachusetts legislature enacted Chapter 150 of the Acts of 2001 ("Chapter 150"), which amended MASS. GEN. LAWS ch. 51, § 1, the statute regarding voting qualifications for *all* Massachusetts elections – that is, not just those elections where voting qualifications are set directly by the Massachusetts Constitution. Chapter 150 took effect on November 27, 2001.

2. Petitioners[2] commenced this action on a *pro se* basis, filing a Complaint on August 5, 2001. The Complaint alleged that Article 120 violated, *inter alia*, Section 2 of the Voting Rights Act, and the Equal Protection and Ex Post Facto Clauses of the United States Constitution. Counsel was appointed to represent Petitioners in July 2002. The parties entered into a "Stipulation in Lieu of Class Certification" in January 2003.[3] The parties filed cross-motions for summary

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2. The original complaint was filed by plaintiffs Darcy Lowe, Paul Simmons, Pedro Valentin, and Marcos Naranjo. Darcy S. Lowe and Marcos Naranjo are no longer incarcerated, and thus they are no longer parties to this action. Dennis Beldotti was subsequently substituted as a plaintiff for Darcy Lowe.

3. The stipulation provides that a class action is unnecessary because, if Petitioners prevail on the merits of any of their claims, then Secretary Galvin shall not apply any state law found to be unlawful against any otherwise eligible Massachusetts voter incarcerated in a correctional facility for a felony conviction.

judgment on the Ex Post Facto and Equal Protection claims, and the Commonwealth moved for judgment on the pleadings on the VRA § 2 claim. On August 30, 2007, the district court denied the Commonwealth's motion for judgment on the pleadings on the VRA claim, and granted the Commonwealth's motion for summary judgment (and denied Petitioners' motion for summary judgment) on the Ex Post Facto and Equal Protection claims. (*See* App. B.) Upon petition from the Commonwealth, the district court certified its denial of judgment on the pleadings on the VRA § 2 claim for interlocutory review under 28 U.S.C. § 1292(b).

3. The First Circuit granted leave for the parties to appeal all claims in the case under § 1292(b). (App. A at 11a.) The Commonwealth, as appellant, appealed the district court's denial of judgment on the pleadings as to the VRA § 2 claim. Petitioners, as cross-appellants, appealed the district court's grant of summary judgment in favor of the Commonwealth on the Ex Post Facto claim.[4] On July 31, 2009, the First Circuit reversed the district court as to Petitioners' VRA claim and affirmed the district court as to Petitioners' Ex Post Facto claim, ordering that Petitioners' claims be dismissed with prejudice. Petitioners timely filed a Petition for Panel Rehearing and Rehearing *En Banc* on September 17, 2009. The Petition was denied on September 2, 2009. (*See* App. C.)

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4. Petitioners did not appeal that portion of the district court's decision granting summary judgment on their Equal Protection claim.

REASONS FOR GRANTING THE PETITION

1. The first question presented in this case is whether VRA § 2 applies to state felon disenfranchisement laws that result in discrimination on the basis of race. The Ninth Circuit has concluded that such felon disenfranchisement claims are cognizable under VRA § 2. *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003) (*Farrakhan I*). The Second and Eleventh Circuits, both sitting *en banc*, have concluded that they are not. *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006); *Johnson v. Gov. of Fla.*, 405 F.3d 1214 (11th Cir.), *cert. denied sub nom. Johnson v. Bush*, 546 U.S. 1015 (2005). Further, the Ninth Circuit has recently held that such claims under VRA § 2 are not merely cognizable, but can also be proved if allowed to proceed beyond the pleading stage. *Farrakhan v. Gregoire*, No. 06-35669, 2010 WL 10969 (9th Cir. Jan. 5, 2010) (*Farrakhan II*). Indeed, the court in *Farrakhan II* concluded that *Farrakhan I* remains binding law in the Ninth Circuit, the intervening rulings in *Johnson*, *Hayden*, and this case notwithstanding. *Id.* at *7-8. The Ninth Circuit further held, after reviewing expert evidence, that "[p]laintiffs have demonstrated that the discriminatory impact of Washington's felon disenfranchisement is attributable to racial discrimination in Washington's criminal justice system," and thus that "Washington's felon disenfranchisement law violates § 2 of the VRA." *Id.* at *23.

The First Circuit's ruling is in harmony with certain aspects of Second and Eleventh Circuit opinions, but is in direct conflict with the Ninth Circuit in *Farrakhan I* and *Farrakhan II*. The First Circuit panel decision was issued over vigorous dissent (App. A at 50a (Torruella,

J., dissenting)), just as were the *en banc* decisions of the Second and Eleventh Circuits. *See Hayden*, 449 F.3d at 343-62 (Parker, J., dissenting, joined by Calabresi, Pooler, and Sotomayor, JJ.); *id.* at 362-67 (Calabresi, J., dissenting); *id.* at 367-68 (Sotomayor, J., dissenting); *id.* at 368-69 (Katzmann, J., dissenting); *Johnson*, 405 F.3d at 1239-44 (Wilson, J., dissenting in relevant part); *id.* at 1247-51 (Barkett, J., dissenting). This split among the circuits as to the application of VRA § 2 to state felon disenfranchisement laws requires resolution by this Court.[5]

2. With regard to the second question presented, the Ex Post Facto issue, the First Circuit has rendered an opinion that purports to decide an important question of federal law that should be settled by this Court. Specifically, in applying the "clearest proof" standard to assess the factors set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), in the absence of a plain statement by the legislature of civil regulatory intent, the First Circuit forged ahead in a manner inconsistent with the holdings of this Court. *Hudson v. United States*, 522 U.S. 93, 100 (1997) (citing *United States v. Ward*, 448 U.S. 242, 249 (1980)). This use of the incorrect standard coupled with the First Circuit's cursory treatment of the relevant factors presented the Petitioners with an improperly enhanced

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5. The Fourth and Sixth Circuits, while they have addressed somewhat similar claims, have never directly considered the question presented here, *i.e.*, whether allegedly discriminatory felon disenfranchisement statutes may be challenged under VRA § 2. *See Howard v Gilmore*, No. 99-2285, 2000 WL 203984 (4th Cir. 2000) (per curiam); *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986).

challenge despite the fact that each of the *Mendoza-Martinez* factors weighs in favor of the punitive nature of Article 120's brand of felon disenfranchisement. Only this Court can clearly set forth the proper standard to be applied to the *Mendoza-Martinez* factors when the legislature has not made its intentions sufficiently clear.

I. Review Is Warranted To Resolve A Conflict Concerning The Application Of VRA § 2 To Discriminatory Felon Disenfranchisement Laws On Statutory Grounds.

A. The text of VRA § 2(a) is clear, and its coverage is broad.

This Court has repeatedly instructed that in construing a statute, a court's analysis must start with the statute's text. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999). A court "must presume that [the] legislature says in a statute what it means and means in a statute what it says there." *Dodd v. United States*, 545 U.S. 353, 357 (2005) (citing *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). While it is true that statutory interpretation also turns on "the specific context in which that language is used" and "the broader context of the statute as a whole," *Nken v. Holder*, 129 S. Ct. 1749, 1756, 173 L.Ed.2d 550 (2009) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)), that does not deflect from the primacy of a statute's text. "When a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992).

The threshold inquiry in this case is whether Petitioners' claims fall within the ambit of § 2(a) of the Voting Rights Act, which provides that:

> *No* voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . .

42 U.S.C. § 1973(a) (emphasis added).

The coverage of § 2(a) is not qualified in any way. Thus, by the plain terms of the Act, if a state voting qualification or prerequisite is alleged to have resulted in a denial of the right to vote on account of race, that allegation should be permitted to proceed beyond the pleading stage. Indeed, there is little dispute as to the breadth of coverage of VRA § 2. *Chisom v. Roemer*, 501 U.S. 380, 403-04 (1991); *see also Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 129 S. Ct. 2504, 2509, 174 L.Ed.2d 140 (2009). It is "indisputable," the Second Circuit stated, that Congress intended to give the VRA "the broadest possible scope.'" *Hayden*, 449 F.3d at 318 (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969)).

As originally enacted, § 2 of the VRA was construed to combat only voting qualifications or prerequisites that were determined to be intentionally discriminatory. Finding that this standard did not provide the protections it had originally hoped, and in response to

this Court's decision in *Mobile v. Bolden*, 446 U.S. 55 (1980), Congress amended the VRA in 1982, bifurcating it into the current § 2(a) and § 2(b). *Chisom*, 501 U.S. at 393-95. Section 2(a) adopted a results test, "thus providing that proof of discriminatory intent is no longer necessary to establish *any* violation of the section." *Id.* at 395 (emphasis in original). Section 2(b) established a totality-of-the-circumstances test, which provides "guidance about how the results test is to be applied." *Id.*

Based on text alone, there can be little argument that a claim for discriminatory felon disenfranchisement – an obvious "qualification" which results in the denial of an individual's right to vote – is covered by the broad and unambiguous language of VRA § 2(a).

B. Felon disenfranchisement laws are not so unique as to be excluded from the broad reach of the VRA.

Despite the breadth and clarity of VRA § 2(a), the First Circuit excluded felon disenfranchisement laws from its reach because, as the panel majority posited, "[f]elon disenfranchisement statutes are not like all other voting qualifications. Congress has treated such laws differently. They are deeply rooted in our history, in our laws, and in our Constitution." (App. A at 22a.) The First Circuit thus left the door open for a host of vote denial claims to be brought under VRA § 2 (as is proper given the Act's indisputably broad coverage), excluding *only* those based on felon disenfranchisement. *Id.* at 3a. This notion that felon disenfranchisement laws are *sui generis* is heavily disputed within and among the circuit courts.

1. The First Circuit allowed context and legislative history to trump the plain language of VRA § 2(a).

As judge Torruella pointed out in dissent, "this is a case about interpreting a clearly worded congressional statute . . . according to its own terms, when there is no persuasive reason to do otherwise." (App. A at 50a-51a.) The panel majority's rebuttal to this was to state, in conclusory fashion, that "[a]s a matter of textual analysis, it is neither plain nor clear that plaintiffs' claim fits within the text of § 2(a)." (*Id.* at 23a.) Yet this statement flies in the face of the text of the VRA itself, which clearly applies to all "voting qualifications." Article 120 to the Massachusetts Constitution, which sets forth the Commonwealth's disenfranchisement scheme, is plainly a "voting qualification." Petitioners have alleged that Article 120, in combination with "past practices in the Massachusetts criminal justice system," has "resulted in disproportionate disqualification of minorities from voting." (*Id.* at 2a.) The same is true of MASS. GEN. LAWS. ch. 51, § 1, which merely codified Article 120 and extended the incarcerated felon "voting qualification" to all state elections.

Such a plain reading is not simply of Petitioners' creation; rather, it was endorsed by the Ninth Circuit in *Farrakhan I*, and by several judges in *Hayden* and *Johnson*. In *Farrakhan I*, the court held that "[f]elon disenfranchisement is a voting qualification, and § 2 is clear that *any* voting qualification that denies citizens the right to vote in a discriminatory manner violates the VRA." 338 F.3d at 1016 (emphasis in original). Similarly, as then Judge Sotomayor stated in dissent in

Hayden: "It is plain to anyone reading the Voting Rights Act that it applies to all 'voting qualifications.' And it is equally plain that [the New York felon disenfranchisement statute] disqualifies a group of people from voting. These two propositions should constitute the entirety of our analysis." 449 F.3d at 367-68. Further, "[a]s a purely textual matter," the dissenters in *Johnson* stated, "a voting qualification based on felony status that interacts with social and historical conditions to produce a racially discriminatory effect, such as race bias in the criminal justice system, falls within the scope of the VRA." 405 F.3d at 1240.

The First Circuit's only argument based purely on text is cagily confined to a single paragraph of its lengthy opinion, in which it suggests that "it is logical to understand the state law disenfranchisement of incarcerated felons as not 'resulting' *in a denial 'on* account of race or color' but on account of imprisonment for a felony, and thus not within the text of § 2 at all." (App. A at 23a.) This argument is far from "logical," and indeed miscomprehends the nature of Petitioners' allegations. Article 120 and Chapter 150 dictate that *in* Massachusetts, disenfranchisement will result from imprisonment for a felony and will last for the period of incarceration. Petitioners do not contest this fact. What they allege, however, is that their felony imprisonments – and hence their loss of the right to vote upon enactment of Article 120 – were disparately (and negatively) impacted by their race. It is not Article 120 alone which is alleged to violate VRA § 2, but rather in conjunction with "past practices in the Massachusetts criminal justice system." (*Id.* at 2a.) Petitioners' claim may be a nuanced one, and it may indeed be difficult to

prove, but it is capable of being proven, *see Farrakhan II*, and it fits squarely within the text of VRA § 2.

In light of the clarity of the plain language of VRA § 2, it was error for the First Circuit to override it with context and legislative intent, as discussed in more detail below.

2. Application of VRA § 2 to discriminatory felon disenfranchisement laws is not inconsistent with Section 2 of the Fourteenth Amendment.

The First Circuit's contextual argument for why VRA § 2 should not be read to cover discriminatory felon disenfranchisement laws is straightforward. "The power of the states to disqualify from voting those convicted of crimes," the panel majority argued, "is explicitly set forth in § 2 of the Fourteenth Amendment." (App. A at 15a.) This is the same as the primary argument put forward by the Second and Eleventh Circuit majorities. *See Johnson*, 405 F.3d at 1218; *Hayden*, 449 F.3d at 316.

Section 2 of the Fourteenth Amendment does indeed "affirmative[ly] sanction" the exclusion of felons from the right to vote. *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974). An affirmative sanction, however, is not the same as an unlimited sanction. The sanction is limited, of course, by the constraints of the Fifteenth Amendment, which postdates the Fourteenth, and which expressly outlaws voting discrimination on account of race. *Hayden*, 449 F.3d at 350-51 (Parker, J., dissenting). It is by the power of the Fifteenth Amendment that § 2 of the VRA originally drew its force, and by which the

Act's prohibition against all voting qualifications imposed or applied by any state in a manner which results in a denial or abridgement of the right to vote on account of race or color is supported. *Id.*; *see also Chisom*, 501 U.S. at 391-92. Thus, the "constitutional grounding" for a state to deny felons the right to vote (App. A at 16a), can only go so far. And in the instant case, where racially *discriminatory* results are alleged on account of a felon disenfranchisement scheme in combination with other factors, the constitutional grounding disappears. Indeed, the reverse is true: there is constitutional grounding for plaintiffs' claims sounding in discrimination, and no constitutional grounding for the Commonwealth's alleged discriminatory method of denying felons the right to vote.[6] (App. A at 68a n.36 (Torruella, J., dissenting));

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6. For this reason, reliance on the "clear statement" rule is misplaced in the context of VRA § 2. While the First Circuit did not address it in precisely these terms, some judges have suggested that the VRA question presented in this case implicates the "clear statement" or "plain statement" rule, a rule of construction which places a heightened burden on Congress to make clear its intent when enacting statutes "that would alter the usual constitutional balance between the Federal Government and the States." *Hayden*, 449 F.3d at 323 (citing *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)); *see also Johnson*, 405 F.3d at 1229, 1232. Yet applying VRA § 2 to racially discriminatory felon disenfranchisement laws would maintain, not disrupt, the constitutional balance between Congress and the states. Congress has the power to target racially discriminatory state felon disenfranchisement laws under the VRA not because such laws involve felon disenfranchisement, but because they involve racial discrimination. In other words, the relevant "constitutional balance" was set by the Fifteenth

(Cont'd)

see also Hayden, 449 F.3d at 352 (Parker, J., dissenting); *Johnson*, 405 F.3d at 1241 (Wilson, J., dissenting in relevant part).

Section 2 of the Fourteenth Amendment was designed to penalize any state that disenfranchised its male citizens by reducing its proportional representation in the U.S. House of Representatives. *Hayden*, 449 F.3d at 351 (Parker, J., dissenting); *Johnson*, 405 F.3d at 1240 (Wilson, J., dissenting in relevant part). The exception to this penalty is for those citizens who participate in "rebellion" or "other crime."

(Cont'd)

Amendment, which permits the VRA to intrude on state sovereignty. *See Lopez v. Monterey County*, 525 U.S. 266, 284-85 (1999). The very purpose of the Fifteenth Amendment, after all, was to strip the states of their power to regulate voting, a power which had been abused by the states over and over again. *See Hayden*, 449 F.3d at 58 (Parker, J., dissenting) (quoting *Gregory*, 501 U.S. at 468).

It is instructive that in *Chisom*, the Supreme Court had a similar opportunity to apply the clear statement rule to the VRA, and yet that possibility "never crossed [the Court's] mind." 501 U.S. at 412 (Scalia, J., dissenting); *see also Baker v. Pataki*, 85 F.3d 919, 938 (2d Cir. 1996) (Feinberg, J., writing for half of an equally divided court) (describing *Chisom* as "clear Supreme Court authority that the plain statement rule does not apply when determining coverage under § 2 of the Voting Rights Act" (emphasis in original)). Even in *Hayden*, a majority of the Second Circuit rejected an application of the clear statement rule to the VRA. 449 F.3d at 337 (Straub, J., concurring) ("We do not join in any holding that a clear statement rule applies here, as we believe such a rule, in addition to being unnecessary to the disposition of this case, would be inappropriate in the voting rights context.").

This "other crime" exception, however, cannot reasonably be read to have been intended to sanction the behavior of states that disenfranchised their felons in a racially discriminatory manner. Such an interpretation would allow the narrow scope of § 2 of the Fourteenth Amendment (which, by any reasonable reading, is limited to the states' representation in Congress, not to the franchise in general) to trump the broad scope of § 1 of the same Amendment (which, among other things, prevents discrimination on the basis of race). *See Hunter v. Underwood*, 471 U.S. 222, 233 (1985). Even the *Hayden* majority was willing to concede as much: "The Fourteenth Amendment . . . does not completely insulate felon disenfranchisement provisions from constitutional scrutiny. It is clear, for example, that if a State disenfranchises felons with the intent of disenfranchising blacks, that State has run afoul of Section 1 of the Fourteenth Amendment." 449 F.3d at 316 n.11 (internal quotation marks omitted); *see also id.* at 323 n.20.

Thus, it does not follow that Congress, by not referring at all to felon disenfranchisement in § 2 of the VRA, was relying on § 2 of the Fourteenth Amendment to supply the default. If Congress had been so concerned that the "other crimes" exception to § 2 of the Fourteenth Amendment not be trammeled by the VRA, then it had every opportunity to say so expressly. Indeed, as Judge Parker pointed out in *Hayden*, "the Fifteenth Amendment was enacted, among other reasons, precisely because the Fourteenth Amendment – including § 2 – did not prohibit states from disenfranchising Blacks." 449 F.3d at 352.

3. Application of VRA § 2 to discriminatory felon disenfranchisement laws is not inconsistent the legislative history of the Act.

The First Circuit also relied on the legislative history of the VRA to buttress its rejection of Petitioners' claims. Yet even assuming a review of the legislative history of the VRA is merited in this case, *cf. Dodd*, 545 U.S. at 357, such history does not supply reliable or convincing evidence that Congress intended a complete carve-out for felon disenfranchisement laws, including those that were found to be discriminatory in nature or effect. Nothing in the legislative history of VRA § 2 indicates that felon disenfranchisement – and felon disenfranchisement *only* – was somehow immune from the Act's prohibitions. Construing VRA § 2 to apply to racially discriminatory felon disenfranchisement laws is by no means "absurd" or "unthinkable" in light of the Act's legislative history. *Cf. Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring); *but see Hayden*, 449 F.3d at 322-23.

When Congress first enacted the VRA, it documented numerous violations of the Fifteenth Amendment, including so-called "grandfather clauses," laws "restricting the participation in political primaries to whites only," "procedural hurdles," "racial gerrymandering," "improper challenges," and "the discriminatory use of tests." *Johnson*, 405 F.3d at 1243 (Wilson, J., dissenting in relevant part) (quoting H.R. Rep. No. 89-439, at 8 (1965)). Congress therefore included language in the narrower § 4 of the Act which banned certain nefarious practices regardless of

whether a plaintiff can show that they result in racial discrimination in a given case. *Hayden*, 449 F.3d at 352-53 (Parker, J., dissenting).

But Congress also concluded that "innovation in discrimination marked the landscape of voting rights." *Johnson*, 405 F.3d at 1243 (Wilson, J., dissenting in relevant part) (quoting S. Rep. No. 89-439, at 15 (1965)); *see also id.* ("[E]ven after apparent defeat resisters seek new ways and means of discriminating. Barring one contrivance too often has caused no change in result, only in methods." (quoting S. Rep. No. 89-439, at 10)). "Congress found specifically that it was impossible to predict the variety of means that would be used to infringe on the right to vote." *Id.* In passing the 1982 amendments, Congress again documented the non-exhaustive nature of its findings. "Following the dramatic rise in registration, a broad array of dilution schemes were employed to cancel the impact on the new black vote . . . . The ingenuity of such schemes seems endless." S. Rep. No. 97-417, at 6 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 183.

For this reason, Congress intentionally kept § 2(a) as broad as possible. It enacted a general provision under which any "voting qualification" – including (i) those that Congress knew about but understood to be used sometimes for valid purposes, (ii) those voting qualifications with which it was not yet familiar, and even (iii) those practices that Congress understood to be entirely legitimate but that later could be twisted to ill purposes – would violate the VRA if it "result[ed] in a denial or abridgement of the right of any citizen of the United States to vote on account of race."

42 U.S.C. § 1973(a). Thus, just because Congress did not enact a *per se* ban on felon disenfranchisement laws (as § 4 did for "tests and devices"), it does not follow that all felon disenfranchisement laws are necessarily valid, or that such laws can never be challenged under VRA § 2. In other words, Congress did not intend the VRA to categorically ban felon disenfranchisement laws, but that does not mean that it did not intend § 2 to ban *discriminatory* felon disenfranchisement laws. *See Hayden*, 449 F.3d at 362-65 (Calabresi, J., dissenting).

As for the 1982 amendments, the First Circuit stated that "[n]othing in the legislative history of § 2(b) indicated any intent to expand the VRA to create a cause of action against a state felon disenfranchisement law such as Article 120." (App. A at 35a-36a.) Yet there would have been no need to expand the VRA to cover a cause of action which was already covered by the express language of § 2. This silence only demonstrates that Congress was not motivated by felon disenfranchisement problems when it passed the 1982 amendments. *See Hayden*, 449 F.3d at 356 (Parker, J., dissenting) ("It is hardly surprising that legislators did not focus on felon disenfranchisement and minority voting during the debates surrounding the passage of the VRA, or even during its amendment in 1982, since the problem as it currently manifests itself did not exist."). Even if felon disenfranchisement was a "well-known and accepted part of the voting landscape" in 1982 (App. A at 36a), that does not in any way undermine the clear intention of § 2 to prohibit racially *discriminatory* voting practices, including felon disenfranchisement laws. Indeed, by expanding the VRA in 1982 to cover claims based on discriminatory results, rather than merely discriminatory intent, Congress deliberately opened the

door for potentially more complex and nuanced theories of causation, such as the theory Petitioners advance here (*see* App. A at 64a-66a (Torruella, J., dissenting)), and such as the theory that was successfully proven after expert discovery in *Farrakhan II*. *See* 2010 WL 10969 at *11-21.

C. The "narrowness" of Article 120 is irrelevant to the basic question regarding the applicability of VRA § 2 to felon disenfranchisement laws that result in discrimination.

The First Circuit intimated that its decision was based in part on the fact that the Article 120 "is among the narrowest of state felon disenfranchisement provisions." (App. A at 13a.) For example, the court seemingly distinguished its holding from that of the Ninth Circuit in *Farrakhan I* by conceding that some courts have concluded that felon disenfranchisement statutes, "not as narrow as this one," may be challenged under VRA § 2. (*Id.* at 14a.) Yet if allegedly discriminatory felon disenfranchisement statutes are not covered by VRA § 2, then their relative scope should be irrelevant. (*Id.* at 55a (Torruella, J., dissenting); *see also Hayden*, 449 F.3d at 349 (Straub, J., concurring in part and concurring in judgment) (noting that "there may well be important distinctions between the impact of the felon disenfranchisement statute at issue here and those that provide for lifetime disenfranchisement," but that distinction does not matter for purposes of the VRA analysis)). Similarly, if discriminatory felon disenfranchisement statutes *are* covered by VRA § 2, then such a distinction is also not relevant. Indeed, in *Farrakhan II*, a completely new panel upheld the prior

panel's ruling as to the applicability of VRA § 2 to the Washington disenfranchisement statute, despite the passage of intervening amendments making the statute narrower. *See* 2010 WL 10969. "[N]o matter how well the amended law functions to restore at an earlier time the voting rights of felons who have emerged from incarceration," the Ninth Circuit held, "it does not protect minorities from being denied the right to vote upon conviction by a criminal justice system that Plaintiffs have demonstrated is materially tainted by discrimination and bias." *Id.* at *22.

By making the relative scope of a state's felon disenfranchisement scheme an important factor in its analysis, the First Circuit undercut its own holding. Any such inquiry – for example, whether the statutory scheme disenfranchises felons for life, or through parole, or only through incarceration – is more properly applied to the results tests under § 2(b) of the VRA. The relative scope of a state's disenfranchisement scheme *may* make it more or less difficult to prove an actual violation. *See, e.g., id.* at *24 (McKeown, J., dissenting) (advocating for remand to the district court to consider the effect of the amended law on the plaintiff's case and "whether the totality of the circumstances analysis under § 2 of the Voting Rights Act should be different now that plaintiffs' case remains viable only as to currently incarcerated felons"). But the proper application of the totality of the circumstances test under VRA § 2(b) is not at issue here, where the parties still remain at the pleading stage. *See id.* at *8 (majority opinion) ("Whether Plaintiffs can succeed on their VRA claim is irrelevant to the question whether they are entitled to bring that claim in the first place.").

II. Review Is Warranted To Resolve A Conflict Concerning The Application Of VRA § 2 To Discriminatory Felon Disenfranchisement Laws On Constitutional Grounds.

Choosing to base its decision entirely on statutory grounds, the First Circuit avoided discussion of the constitutional implications arising from the application VRA § 2 to discriminatory state felon disenfranchisement laws. (*See* App. at 41a.) This emphasis on constitutional avoidance is consistent with portions of the majority opinions in both *Hayden* and *Johnson*. However, other portions of the splintered decisions in *Hayden* and *Johnson* also raised constitutional concerns (primarily with respect to Congress's enforcement powers under § 2 of the Fifteenth Amendment), placing the Second and Eleventh Circuits in conflict with the Ninth Circuit in *Farrakhan I*, which viewed such concerns as entirely unfounded. These alleged constitutional implications, about which there is little consensus among the circuits, are addressed briefly below. Ultimately, they do not pose a significant barrier to Petitioners' claims.

The overall constitutionality of the Voting Rights Act is not, and never has been, in doubt. Indeed, this Court has lauded the VRA as a paradigm of appropriate remedial legislation under the Civil War Amendments. *See, e.g., Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 738 (2003) (describing portions of the VRA as "valid exercises of Congress' § 5 power"); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 373 (2001) (describing the VRA as a proper congressional response to a "serious pattern of constitutional violations");

Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 640 (1999) (supporting congressional power under the VRA on account of the "undisputed record of racial discrimination confronting Congress in the voting rights cases"); *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) (noting that "measures protecting voting rights are within Congress' power to enforce the Fourteenth and Fifteenth Amendments, despite the burdens those measures place[ ] on the States"); *see also Hayden*, 449 F.3d at 360 (Parker, J., dissenting). Congress has expansive authority to enact laws that are designed to enforce the anti-discriminatory mandates of the Fourteenth and Fifteenth amendments. *See Katzenbach v. Morgan*, 384 U.S. 641, 650-51 (1966) (speaking of the "broad scope" of § 5 of the Fourteenth Amendment, which is "a positive grant of legislative power," and observing that § 2 of the Fifteenth Amendment "grants Congress a similar power").

The fact that the VRA addresses race and voting rights, topics expressly referenced in the Fifteenth Amendment, further differentiates it from the statutes that have recently come under increased scrutiny with respect to Congress's Fifteenth Amendment enforcement powers. It would defeat Congress's intent to require that each and every application of the VRA to a voting practice be related to an express Congressional finding of past racial discrimination. *See, e.g.*, *Oregon v. Mitchell*, 400 U.S. 112, 284 (1970) (Stewart, J., concurring in part and dissenting in part) ("Because the justification for extending the ban on literacy tests to the entire Nation need not turn on whether literacy tests unfairly discriminate against Negroes in every State in the Union, Congress was not

required to make state-by-state findings . . . on the Negro citizen's access to the ballot box."). Nor does the mere fact that Congress made findings with respect to certain voting practices that constitute *per se* violations of the VRA (outlined in VRA §§ 4 and 5) undermine Congress's broader powers under the Fourteenth and Fifteenth Amendments to limit those practices that fail § 2's "results" test. *See Hayden*, 449 F.3d at 352-53 (Parker, J., dissenting).

In sum, there is nothing unique to felon disenfranchisement laws – as opposed to other methods in which the right to vote might be abridged in discriminatory fashion – that makes the prospect of including them under the VRA's broad umbrella corrosive to the constitutionality of the VRA as a whole.

III. Review Is Warranted To Determine The Proper Standard To Be Applied To The *Mendoza-Martinez* Factors In The Absence Of Clear Legislative Intent To Regulate.

This Court has provided lower courts with limited guidance to aid in their evaluation of challenges brought under the Ex Post Facto clause. Specifically, the Court has held that when a legislative body has stated its intention to enact a civil regulatory scheme, deference should be accorded to that intent. *See Smith v. Doe*, 538 U.S. 84, 92-93 (2003). Courts have been instructed to demonstrate such deference by requiring the "clearest proof" in order to override legislative intent. *Id.* at 92 (citing *Hudson v. United States*, 522 U.S. 93, 100 (1997)). Where, however, the legislature has failed to make its intention known, courts are presently without sufficient

guidance as to the standard to be applied in analyzing Ex Post Facto challenges. *See Smith*, 538 U.S. at 107 (Souter, J., concurring) (suggesting that ambiguity on the part of the legislature should serve to reduce the burden on the party seeking to prove punitive intent); *see also id.* at 115 (Ginsburg, J. with Breyer, J., dissenting) (advocating for neutral evaluation of legislative purpose and effect in absence of clear statement of legislative intent). Review of Petitioners' claims would afford the Court an opportunity to fill this void.

Indeed, the First Circuit's decision in the present case stands as an example of how the lack of clear direction from this Court can adversely affect the lower courts' analyses of Ex Post Facto claims. As an initial step, the First Circuit improperly extracted from *Trop v. Dulles*, 356 U.S. 86 (1958) a flawed conclusion that all felon disenfranchisement schemes are regulatory and not punitive. (*See* App. A 43a.) The first step of a proper analysis requires a balanced consideration of legislative intent. *See Smith*, 538 U.S. at 92 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)).

Despite its initial missteps, the majority opinion eventually did consider the sparse but powerful legislative history demonstrating the punitive intention underlying the enactment of Article 120, as did Judge Torruella's dissent. *See* App. A at 42a, 83a-85a. Again, however, the First Circuit defaulted to an inappropriate presumption that what it perceived as the absence of evidence of punitive intent justified a finding of a civil regulatory scheme. *See* App. A at 44a-45a (focusing on the absence of language in Article 120 "indicating the

Commonwealth's provision is penal" and the fact that the "Voter Guide read by the voters . . . made no mention of any goal of punishing prisoners"). There is no authority from this Court that holds that civil intent should be assumed until proven otherwise, yet just such a presumption appears to taint the majority opinion. *Id.*

The limited legislative history concerning the enactment of Article 120 clearly indicates an underlying intention to enhance the punishment of incarcerated felons by stripping them of their right to vote. *See* App. A at 83a-85a (Torruella, J., dissenting) (recounting "public statements of proponents of the legislation"). Such a clear manifestation of punitive intent should have marked the end of the First Circuit's inquiry. *Smith*, 538 U.S. at 92. Instead, however, the court proceeded to analyze the *Mendoza-Martinez* factors employing the "clearest proof' standard. *See* App. A at 45a. Had the First Circuit not erroneously transformed what it perceived as a lack of evidence of punitive intent into a presumption of civil regulatory intent, the court would have found, at best, ambiguous legislative intent and employed a more appropriate standard such as a preponderance of the evidence.[7]

Such a lack of clearly-stated legislative intent to regulate rendered it impossible for the First Circuit to know what the Commonwealth's true motivation was,

7. Petitioners also take issue with the First Circuit's cursory analysis of the *Mendoza-Martinez* factors. Had the court conducted an appropriately rigorous examination, it would have found overriding punitive effect whether employing a preponderance standard or the elevated "clearest proof" standard.

and therefore should have prevented the court from employing the deferential "clearest proof" standard. Indeed, where the legislature has failed to make its wishes know expressly or impliedly, the need for deference does not exist. *Smith*, 538 U.S. at 107 ("[T]his heightened burden makes sense only when the evidence of legislative intent clearly points in the civil direction.") (Souter, J., concurring); *see also id.* at 115 (rejecting the "clearest proof" standard where legislative intent is ambiguous) (Ginsburg, J. and Breyer, J., dissenting). Unfortunately for the Petitioners, this Court's opinion in *Smith* failed to provide guidance to the lower courts on this particular point, thereby leaving the first Circuit to its own devices in deciding to apply the "clearest proof" standard. Acceptance of this petition would allow the Court to resolve the confusion that led to this erroneous result.

CONCLUSION

For all of the foregoing reasons, petitioners respectfully request that the Supreme Court grant review in this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED AND FILED JULY 31, 2009

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 08-1569

PAUL SIMMONS; PEDRO VALENTIN; DENNIS BELDOTTI,

Plaintiffs, Appellees/Cross-Appellants,

v.

WILLIAM FRANCIS GALVIN, in his capacity as Secretary of the Commonwealth of Massachusetts,

Defendant, Appellant/Cross-Appellee.

Before

Lynch, *Chief Judge*,
Torruella and Boudin, *Circuit Judges*.

July 31, 2009

LYNCH, Chief Judge. By nearly a two-to-one margin in the year 2000, Massachusetts voters passed Article 120, which amended the state constitution to disqualify currently incarcerated felons from voting in certain elections. Shortly thereafter, the state legislature

extended this disqualification by statute, Chapter 150, to prevent inmates from voting in all Massachusetts elections.

In 2001, several incarcerated felons in state custody, challenged these provisions (collectively "Article 120") by suing the Secretary of the Commonwealth in federal court. This appeal concerns two of their claims: (1) that the Commonwealth's disenfranchisement provisions violated the Voting Rights Act ("VRA") § 2, 42 U.S.C. § 1973, because the percentage of imprisoned felons who are Hispanic or African-American is higher than the percentages of those groups in the population of the state; and (2) that the provisions violated the Ex Post Facto Clause, U.S. Const. art. I, § 10, as to those inmates who were not disqualified from voting before the these provisions took effect. As to their claim under the VRA, the plaintiffs make no allegation of any intentional discrimination or of any history by Massachusetts of intentional discrimination against minority voters. All they have claimed is that past practices in the Massachusetts criminal justice system produced inmate populations which, in combination with the disqualification of inmates imprisoned for felonies, have resulted in disproportionate disqualification of minorities from voting. Theirs is a claim of disparate impact.

After allowing initial discovery, the district court in 2007 denied the Commonwealth's motion for entry of judgment on the pleadings on plaintiffs' VRA claim but granted the Commonwealth's motion for summary judgment on the Ex Post Facto Clause argument.

Appendix A

We think it clear from the language, history, and context of the VRA that Congress never intended § 2 to prohibit the states from disenfranchising currently incarcerated felons. We do not say that direct vote denial claims of other types may not be brought under § 2, only that no VRA claim is stated against a state law which disenfranchises incarcerated felons. We reverse and order the dismissal of the VRA § 2 claim. We affirm the grant of summary judgment on the Ex Post Facto claim.

I.

A. *Enactment of the Massachusetts Incarcerated Felon Disenfranchisement Provisions*

Before Article 120 was enacted, prisoners were able to vote by absentee ballot. In 1997, there was an unsuccessful proposal for legislation to disenfranchise currently incarcerated persons for certain felonies: murder, rape, other sex-related offenses, and controlled substances offenses. Massachusetts prisoners responded by forming a political action committee ("PAC"), aimed at influencing criminal justice issues, including sentencing, prison reform, and "Draconian laws on punishment." PACs, inter alia, raise money for and endorse candidates.

State elected officials reacted swiftly. On August 12, 1997, then-Acting Governor Cellucci proposed a constitutional amendment that would disenfranchise all incarcerated individuals (not just felons), saying:

> Criminals behind bars have no business deciding who should govern the law-abiding

> citizens of the Commonwealth. This proposed amendment will ensure that criminals pay their debt to society before they regain their right to participate in the political process.

The legislature did not act on this proposal. Rather, the legislature approved a different proposed amendment that would disenfranchise only those currently incarcerated for felonies. Lawmakers received the legal opinions of House and Senate Counsel that such an alternative amendment would be constitutional under the U.S. Constitution.

Article 120, the proposed amendment to Article 3 of the Amendments to the state constitution, was presented to the voters along with an Information for Voters Guide. That Guide constitutes relevant legislative history. The Guide included 150-word arguments written by proponents and opponents of each ballot question. The statement from the proponents stated, "A yes vote prevents criminals serving time for a felony conviction from voting in Massachusetts's elections while in jail." The proponents argued:

> When someone in Massachusetts is sentenced to jail for committing a felony, we deprive them of their liberty and right to exercise control over their own lives, yet current law allows these same criminals to continue to exercise control over our lives by voting from prison. This amendment will change the law that gives jailed criminals the right to vote.

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> Massachusetts is one of only three states in our nation where felons serving time may vote while in jail. Voting yes on this important question will make the Commonwealth the 48th state to prohibit the practice of allowing convicted criminals to vote from jail. This change discriminates against no one except jailed criminals.

The Guide also contained the opponents' argument:

> The Constitution of Massachusetts is clear on this point: Citizens retain their right to vote even while incarcerated. The founders of Massachusetts intended this right, and our Supreme Judicial Court affirmed in in 1977. In the history of the Commonwealth, we have never amended our Constitution in order to narrow fundamental rights. There is no reason to do so now.
>
> No one has alleged that prisoner voting has harmed our democracy or social fabric. Very few prisoners vote, and no one claims that prisoner voting has negatively influenced any election. Stripping incarcerated felons of their right to vote serves no public safety function. It will not deter crime, repair the harm done by crime, nor help to rehabilitate prisoners.

The voters approved the amendment with 60.3% voting "yes" to 33.9% voting "no," and 5.8% of voters not casting a vote on the question. The amendment took effect on December 6, 2000. Article 3 now reads:

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> Every citizen of eighteen years of age and upwards, *excepting persons who are incarcerated in a correctional facility due to a felony conviction*, and excepting persons under guardianship and persons temporarily or permanently disqualified by law because of corrupt practices in respect to elections who shall have resided within the town or district in which he may claim a right to vote, six calendar months next preceding any election of governor, lieutenant governor, senators or representatives, shall have a right to vote in such election of governor, lieutenant governor, senators and representatives; and no other person shall be entitled to vote in such election.

Mass. Const. amend. art. 3 (emphasis added).

The Massachusetts legislature then enacted Chapter 150 of the Acts of 2001, which effectuated Article 120 by broadening the ban on felon voting to cover all Massachusetts elections and by changing the statutory requirements for obtaining absentee ballots. Chapter 150 took effect November 27, 2001. Unlike many other states, Massachusetts does not disqualify convicted felons from voting once they are released from prison.

B. *Procedural History of the Litigation*

Plaintiffs Paul Simmons, an African-American, Pedro Valentin, a Hispanic-American, and Dennis J. Beldotti, a Caucasian-American, are Massachusetts

residents currently in the custody of the Massachusetts Department of Correction for felonies they committed on or before December 5, 2000. Plaintiffs were eligible to be Massachusetts voters before that date, but the record does not reveal whether they were registered to vote.

Plaintiffs' pro se complaint was amended twice by court-appointed counsel. Their final amended complaint alleged that Article 120 violates § 2 of the VRA because it has a "disproportionately adverse effect on the voting rights of African-Americans and Hispanic Americans compared to its effect on the voting rights of other citizens." This effect "is caused by, among other things, the facts that African-Americans and Hispanic-Americans are over-represented in the population of Massachusetts incarcerated felons, and that there exists considerable racial and ethnic bias, both direct and subtle, in the Massachusetts court system."[1] Article 120, plaintiffs contended, "interact[s] with social and historical conditions to cause an inequality in the opportunities enjoyed by minority and non-minority voters to elect their preferred representatives."

In describing plaintiffs' complaint, which alleges a "vote denial" claim, we distinguish vote denial cases from

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1. By "over-represented" the complaint referred to the representation of African-Americans and Hispanic-Americans in the prison population compared with their representation in the Massachusetts population at large, but gave no statistics.

vote dilution[2] claims under § 2 of the VRA. The Supreme Court first articulated the distinction in explaining that "[t]he right to vote can be affected by a *dilution* of voting power as well as by an absolute prohibition on casting a ballot." *Shaw v. Reno*, 509 U.S. 630, 640, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 569, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969)). Thus in voting rights parlance, " '[v]ote denial' refers to practices that prevent people from voting or having their votes counted." D.P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L.Rev. 689, 691 (2006). Vote denial cases challenge practices such as literacy tests, poll taxes, white primaries, and English-only ballots. *Id.* By contrast, vote dilution challenges involve "practices that diminish minorities' political influence," such as at-large elections and redistricting plans that either weaken or keep minorities' voting strength weak. *Id.; see also* P.S. Karlan, *The Impact of the Voting Rights Act on African Americans, in Voting Rights and Redistricting* 121, 122 (M.E. Rush ed., 1998).

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2. Vote dilution claims comprise the vast majority of § 2 claims. *See* E. Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. Mich. J.L. Reform 643, 650 (2005), *available at http:// sitemaker. umich. edu/ votingrights/ files/ finalreport. pdf*; D.P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L.Rev. 689, 709 (2006) ("[I]t is clear that the overwhelming majority of Section 2 lawsuits since 1982 have involved claims of vote dilution and not vote denial."); *see generally*, *Bartlett v. Strickland*, — U.S. ——, 129 S.Ct. 1231, 1240-41, 173 L.Ed.2d 173 (2009) (plurality opinion).

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To be clear, plaintiffs did not allege and have disavowed making a § 2 vote dilution claim, such as that the votes of African-Americans and Hispanics who are not imprisoned for felonies have been diluted by Article 120. This case also does not involve any claim that generalized rules or practices governing the administration of elections have resulted in a disproportionate denial of votes of minorities. Further, plaintiffs have not asserted that the state has otherwise created barriers to the election of minority group members or other participation of minorities in the political process. Finally, the plaintiffs' complaint made no allegation that the Commonwealth acted with racially discriminatory intent or purpose in enacting Article 120, and plaintiffs have specifically disavowed any such claim. This is a claim based purely on the allegation that Article 120 has a disparate impact on minorities by disqualifying from voting imprisoned felons.

In support of their pleadings, the complaint referred to and appended a 1994 Final Report by the Commission to Study Racial and Ethnic Bias in the Courts to the Massachusetts Supreme Judicial Court ("SJC").[3]

3. The specific findings in the 1994 Commission Report, as stated in the pleadings, included that "racial minorities were underrepresented in jury pools selected from communities with large racial and ethnic populations; that Massachusetts courts are an unfriendly environment for people whose primary language is not English . . . ; and that minorities are underrepresented in [the] Massachusetts bar and bench." The 1994 Report itself goes on to say, as to sentencing, that it lacked

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Plaintiffs alleged the legislators were aware of or should have been aware of the conclusions in that 1994 Report. That 1994 Report, however, was not referenced in or part of the Voters Guide, and there is no claim the voters were aware of it.

Plaintiffs further alleged that Article 120 is punitive in purpose and effect and therefore violates the Ex Post Facto Clause as to those inmates who committed their offenses before the disenfranchisement measures took effect.

The relief sought was a declaration that Article 120 was unconstitutional under the Ex Post Facto Clause and illegal under § 2 of the VRA, injunctive relief, and costs and attorneys' fees.

Plaintiffs unsuccessfully moved for a preliminary injunction; defendant opposed, filing affidavits which described the legislative history of Article 120 and the ratification process. The parties conducted written discovery.[4] Defendant then moved for summary

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the necessary data to "test [the] hypothesis" that "[r]acial and ethnic bias may influence sentencing decisions." The report did not conclude that any race bias resulted in minority defendants being sentenced as felons.

4. Plaintiffs served interrogatories and document requests on defendant William Galvin, Secretary of the Commonwealth, seeking data as to the effect of Article 120 on minorities. For

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judgment as to the Ex Post Facto and equal protection claims and for judgment on the pleadings as to the VRA § 2 claim on January 12, 2007. The plaintiffs opposed the Commonwealth's motions and also cross-moved for summary judgment as to the Ex Post Facto and equal protection claims.

On August 30, 2007, the district court granted the Commonwealth's motion for summary judgment on the Ex Post Facto Clause claim and the equal protection claim and denied plaintiffs' cross-motion. The court denied the Commonwealth's motion on the VRA claim. On January 16, 2008, the district court certified its order on the VRA claim for interlocutory appeal. Plaintiffs petitioned to cross-appeal on the Ex Post Facto and equal protection claims. This court granted leave to appeal all three claims under 28 U.S.C. § 1292(b). Plaintiffs have abandoned the Equal Protection Clause claim and contest only the Ex Post Facto Clause ruling, and the Commonwealth appeals the denial of its motion for judgment on the pleadings as to the VRA § 2 claims.

C. *Standard of Review*

Our review of the court's ruling on both claims is de novo, and we take the facts in the light most favorable

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example, plaintiffs requested through interrogatories information on all individuals who have been arrested in Massachusetts since 1985 by name, date of birth, Social Security Number, race, ethnicity, skin color, and/or alleged offense. Defendant replied saying defendant did not maintain such records and had no responsive information.

to the plaintiffs. *Estate of Bennett v. Wainwright*, 548 F.3d 155, 163, 165 (1st Cir.2008) (considering dismissals under Rule 12(c) and Rule 56). We treat the denial of a motion for judgment on the pleadings "much like a Rule 12(b)(6) motion to dismiss." *Pérez-Acevedo v. Rivero-Cubano*, 520 F.3d 26, 29 (1st Cir.2008).[5] "[T]o survive a Rule 12(b)(6) motion (and, by extension, a Rule 12(c) motion) a complaint must contain factual allegations that 'raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true.' " *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1965, 167 L.Ed.2d 929 (2007)). Nonetheless, questions of statutory interpretation are questions of law ripe for resolution at the pleadings stage. *Gen. Motors Corp. v. Darling's*, 444 F.3d 98, 107 (1st Cir.2006) ("Statutory interpretation typically raises questions of law engendering de novo review.").

5. Despite the nomenclature of the defendant's motion on the VRA § 2 claim as a motion for judgment on the pleadings, in fact both sides brought additional undisputed materials to the court's attention. "In reviewing a motion [for judgment on the pleadings] under Rule 12(c) . . . we may consider 'documents the authenticity of which are not disputed by the parties; . . . documents central to plaintiffs' claim; [and] documents sufficiently referred to in the complaint.' " *Curran v. Cousins*, 509 F.3d 36, 44 (1st Cir.2007) (alteration and omission in original) (quoting *Watterson v. Page*, 987 F.2d 1, 3 (1st Cir.1993)).

Appendix A

II.

VRA § 2 CLAIM

Plaintiffs' § 2 challenge is to the Massachusetts law disenfranchising only currently incarcerated felons. Article 120 is among the narrowest of state felon disenfranchisement provisions.[6] Only two states permit incarcerated felons to vote, and Massachusetts is one of thirteen jurisdictions that limit disenfranchisement to the period of incarceration. Currently, thirty-five states prevent felons from voting during the period of their parole or probation or both. Eleven states disenfranchise felons beyond the term of their incarceration, probation, and parole. Two states disenfranchise felons for life.

The question of state felon disenfranchisement laws and the VRA § 2 has been addressed by five circuits. Four circuits, including two en banc, have rejected § 2 challenges to broader disqualifications; one panel in the Ninth Circuit had allowed such a § 2 challenge to go forward, although it was ultimately unsuccessful. The Second Circuit, consistent with our holding here, has rejected a § 2 challenge to a state statute disenfranchising prisoners, as well as parolees. *Hayden*

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6. *See Developments in the Law—One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 Harv. L.Rev.1939, 1942-49 (2002) (surveying state felon disenfranchisement statutes). This led the student law review note to comment: "The nation seems to be nearing a consensus that the presently incarcerated should not have the right to vote." *Id.* at 1942.

v. Pataki, 449 F.3d 305 (2d Cir.2006) (en banc). Faced with a state lifetime felon disenfranchisement law, the Eleventh Circuit concluded in an en banc decision that all felon disenfranchisement claims are excluded from the scope of § 2 of the VRA. *Johnson v. Gov. of Fla.*, 405 F.3d 1214 (11th Cir.2005) (en banc). Two circuits have rejected similar claims on the pleadings without directly considering whether felon disenfranchisement statutes are immune from attack under § 2. *Howard v. Gilmore*, No. 99-2285, 2000 WL 203984, at *1 (4th Cir. Feb.23, 2000) (per curiam); *Wesley v. Collins*, 791 F.2d 1255, 1259-61 (6th Cir.1986) (treating claim as a dilution claim). Our conclusion accords with that of the majority of the circuits.

A Ninth Circuit panel decision has concluded that some disenfranchisement statutes, not as narrow as this one, may be challenged under § 2. *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir.2003) (addressing disenfranchisement of those convicted of an "infamous crime" until those former felons comply with civil rights restoration statute). Over a dissent by seven judges, the Ninth Circuit denied the state's petition for rehearing en banc in that case, *Farrakhan v. Washington*, 359 F.3d 1116, 1116 (9th Cir.2004) (Kozinski, J., dissenting). On remand, judgment was entered for the state. *Farrakhan v. Gregoire*, No. CV-96-076-RHW, 2006 WL 1889273 (E.D.Wash. July 7, 2006).

Appendix A

A. *Constitutional Background to the VRA § 2 Claim*

Under the U.S. Constitution, the states generally set the eligibility criteria for voters. "[T]he Constitution 'does not confer the right of suffrage upon any one.' " *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9, 102 S.Ct. 2194, 72 L.Ed.2d 628 (1982) (quoting *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 178, 22 L.Ed. 627 (1874)); *see also* U.S. Const. art. I, § 4; *id.* amend. XIV, § 2; *Bush v. Gore*, 531 U.S. 98, 104, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000) (per curiam) ("The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college.").

The criteria for eligibility to vote are defined by the states, subject to certain federal restrictions, such as the federal constitutional prohibition on exclusion from the franchise on the basis of race, sex, or payment of a poll tax. "No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices." *Oregon v. Mitchell*, 400 U.S. 112, 125, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970).

The power of the states to disqualify from voting those convicted of crimes is explicitly set forth in § 2 of the Fourteenth Amendment. The Supreme Court has

held, "the exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment." *Richardson v. Ramirez*, 418 U.S. 24, 55, 94 S.Ct. 2655, 41 L.Ed.2d 551 (1974). Section 2 concerns the abridgement of the right to vote at any election for "President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or members of the Legislature." U.S. Const. amend. XIV, § 2. The Amendment specifically excludes (from its non-abridgement language) and thus provides for the denial by states of the right to vote to persons "for participation in rebellion, or other crime." *Id.* The Fourteenth Amendment also grants Congress the power to enforce, by appropriate legislation, the provisions of that article. *Id.* § 5. Thus, the state's denial of the right to vote to felons has a constitutional grounding.

Broad felon disenfranchisement provisions are presumptively constitutional. *See Richardson*, 418 U.S. at 54-55, 94 S.Ct. 2655.[7] There, the Court rejected a non-race-based equal protection challenge to the felon disenfranchisement provision of California's constitution. The Supreme Court has continued to adhere to *Richardson*. *See Romer v. Evans*, 517 U.S. 620, 634, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) (describing

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7. The SJC has also recognized that under *Richardson* states may disenfranchise felons. *Dane v. Bd. of Registrars of Voters*, 374 Mass. 152, 371 N.E.2d 1358, 1364 (1978) ("Disfranchisement of convicted criminals by State law was held by the . . . Supreme Court in *Richardson* . . . not to violate the equal protection clause.").

principle that states may disenfranchise a convicted felon as "unexceptionable").

Richardson, to be clear, does not hold that a state felon disenfranchisement law may never raise equal protection concerns. If a state enacts a law which disenfranchises felons "with the intent of disenfranchising blacks," that state has run afoul of § 1 of the Fourteenth Amendment. *Hunter v. Underwood*, 471 U.S. 222, 229, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985) (holding Alabama's petty crime and misdemeanor disenfranchisement provisions unconstitutional under Equal Protection Clause based on evidence of discriminatory intent); *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 477, 105 S.Ct. 3249, n. 25, 87 L.Ed.2d 313 (1985) ("[In *Hunter*], we did not suggest that felons could not be deprived of the vote through a statute motivated by some purpose other than racial discrimination."). Here, plaintiffs make no allegation of intentional discrimination, and on appeal they allege no constitutional violation other than the Ex Post Facto claim. By definition, then, plaintiffs do not assert that whatever discrimination existed in the state's criminal justice system rose to the level of an independent constitutional violation which caused the vote denial.

A state's interest in preventing "persons who . . . were not eligible to vote because they had been convicted of felonies" from inflating its voter rolls was accepted only last year by the Supreme Court as a "neutral and nondiscriminatory reason" for a voter

identification law. *Crawford v. Marion County Election Bd.*, __ U.S. __, 128 S.Ct. 1610, 1619-20, 170 L.Ed.2d 574 (2008).

The legitimacy of the reasons for this state interest in disqualifying imprisoned felons from voting is apparent. Judge Henry Friendly some time ago described some of the pragmatic purposes underlying disenfranchisement laws:

> [I]t can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases.

Green v. Bd. of Elections, 380 F.2d 445, 451 (2d Cir.1967).[8]

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8. There are philosophical reasons as well, such as that those who violate the laws so seriously have removed themselves from the Lockean notion of the social contract:

> The early exclusion of felons from the franchise by many states could well have rested on Locke's concept, so influential at the time, that by entering into society every man "authorizes the society, or which is all one, the legislature thereof, to make laws for him as the public good of the society shall require, to the execution whereof his own assistance (as to his own decrees) is due." A man who breaks the laws he has authorized his agent to make for his

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Here, the Commonwealth enacted this prohibition after prisoners attempted to organize to change the laws under which they were convicted, sentenced, and imprisoned. The state has a strong interest in setting its own qualifications for voters, a strong interest in the integrity of its system of enforcing and administering its criminal laws, and a strong interest in how its correctional systems are maintained and run. *Preiser v. Rodriguez*, 411 U.S. 475, 491-92, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973) ("It is difficult to imagine an activity in which a State has a stronger interest . . . than the administration of its prisons."); *cf. Hayden*, 449 F.3d at 327. The Massachusetts provision, it is important to note, is narrowly tailored. Because the disqualification is confined to currently imprisoned felons, the state interests it serves are clearly at their strongest.

Further, Article 120 of the Massachusetts constitution does not raise issues about a history of laws in Massachusetts, including felon disenfranchisement laws, that were used deliberately to impede voting by minorities. Such historical concerns about practices in other states have been the subject of academic commentary. *See, e.g.*, G. Brooks, Comment, *Felon Disenfranchisement: Law, History, Policy and Politics*, 32 Fordham Urb. L.J. 851, 858-59 (2005) (concluding that

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> own governance could fairly have been thought to have abandoned the right to participate in further administering the compact.

Green, 380 F.2d at 451.

the VRA does not reach state felon disenfranchisement laws). Plaintiffs have made no claim that Massachusetts has historically ever used any tests or devices to discourage minority voting or minority candidates. Nor is there any claim that Massachusetts has defined Article 120 disenfranchisement in terms of felonies that have higher conviction rates for minorities than for whites. *Cf. Hunter*, 471 U.S. at 229, 105 S.Ct. 1916.

B. *Text, Context and Legislative History of § 2*

It is against the backdrop of the Constitution's express approval of felon disenfranchisement provisions, which were not motivated by intentional race discrimination, that Congress enacted the VRA in 1965.

Section 2 of the VRA, 42 U.S.C. § 1973, as amended in 1982, now provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color. . . .
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to

> participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

While the language of the original § 2 tracked the language of the Fifteenth Amendment, prohibiting practices that deny or abridge the right to vote on account of race, the 1982 amendment to § 2 inserted the phrase "*results* in a denial or abridgment." § 1973(b) (emphasis added). The amendment of § 2 also made clear that an abridgement or denial could be identified "as provided in subsection (b)," which was added by the 1982 amendments.

To start, it is clear that under the plain terms of the statute, not every "voter qualification" is actionable under § 2. For § 2 to apply, the burden is on the plaintiffs to make other showings, including that the qualification "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." § 1973(a); *see also Metts v. Murphy*, 363 F.3d 8, 12 (1st Cir.2004) (en banc) (per curiam).

Plaintiffs' theory of how they meet this burden under § 2 is that from the very enactment of § 2 in 1965, the broad language of § 2 has created a cause of action on these facts. Article 120, they contend, is obviously a voter disqualification and the disqualification results in a denial of the right to vote "on account of race" because

the percentages of incarcerated felons who are black or Hispanic are higher than those two groups in the population as a whole.

Plaintiffs argue the language of § 2(a) is so clear it stands alone and that rules of statutory construction prohibit consideration of the history or context of § 2.[9] Plaintiffs' claim assumes that felon disenfranchisement laws are not different from and should be treated like any other voting qualification under § 2. That assumption is a fatal flaw in their case. Felon disenfranchisement statutes are not like all other voting qualifications. Congress has treated such laws differently. They are deeply rooted in our history, in our laws, and in our Constitution. We conclude Congress did not intend § 2 to provide a cause of action against Article 120.

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9. In addition, plaintiffs contend § 2(a) must be read to be independent of § 2(b), which was added by the 1982 amendments. And even if § 2(b) is read as informing and restricting the meaning of § 2(a), plaintiffs submit, they have nonetheless stated a claim under the clear language of § 2(a).

Plaintiffs alternatively argue that, to the extent § 2(b) may be considered, it only establishes a totality of the circumstances test for proving a violation of § 2(a) and in no way limits the scope of § 2(a). Plaintiffs argue that, to the extent § 4 and § 5 (which ban certain practices) are relevant, those later sections demonstrate only that Congress meant § 2(a) to be read broadly. If legislative history is consulted, they argue that the legislative history of § 2 establishes that their claim falls within Congress's intent in enacting § 2.

As a matter of textual analysis, it is neither plain nor clear that plaintiffs' claim fits within the text of § 2(a). For example, it is logical to understand the state law disenfranchisement of incarcerated felons as not "resulting" in a denial "on account of race or color" but on account of imprisonment for a felony, and thus not within the text of § 2 at all.[10] We agree with the Second Circuit that the language of § 2(a) is both broad and ambiguous and that judicial interpretation of a claim concerning felon disenfranchisement under the VRA may not be limited to the text of § 2(a) alone. *See Hayden*, 449 F.3d at 315 (citing *Watt v. Alaska*, 451 U.S. 259, 266, 101 S.Ct. 1673, 68 L.Ed.2d 80 (1981); *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48, 49 S.Ct. 52, 73 L.Ed. 170(1928)).

Under any set of rules of construction, our inquiry into § 2(a) neither starts nor ends with an examination of that text. "[S]tatutory interpretation turns on 'the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.' " *Nken v. Holder*, __ U.S. __, 129 S.Ct. 1749, 1756, 173 L.Ed.2d 550 (2009) (quoting *Robinson v. Shell*

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10. There are questions as to whether a claim of disparate impact is sufficient to state a § 2 vote denial case. *See Johnson*, 405 F.3d at 1235-37 (Tjoflat, J., concurring); *see also Goosby v. Town Bd. of Hempstead*, 180 F.3d 476, 499 (2d Cir.1999) (Leval, J., concurring); *Nipper v. Smith*, 39 F.3d 1494, 1524-25 (11th Cir.1994) (en banc); *LULAC v. Clements*, 999 F.2d 831, 859-63 (5th Cir.1993) (en banc). Whether a claim of mere disproportionality alone supports a "resulting" claim is not clear under § 2 and is a difficult question we need not reach.

Oil Co., 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997)).

Under Supreme Court precedent, we cannot adopt plaintiffs' limited approach. The direction to look at context, structure, history, and constitutional concerns is particularly true of the VRA, a complex statute with an extensive legislative history and caselaw. *See Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, __ U.S. __, 129 S.Ct. 2504, 2513-14, 174 L.Ed.2d 140 (2009) ("[S]pecific precedent, the structure of the Voting Rights Act, and underlying constitutional concerns compel a broader reading of the [VRA's] bailout provision."). The Supreme Court itself, in deciding § 2 cases has never resorted to plain text alone to give § 2 meaning. *See, e.g.*, *Chisom v. Roemer*, 501 U.S. 380, 397, 111 S.Ct. 2354, 115 L.Ed.2d 348 (1991). It has commonly used legislative history. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 426, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006); *see also* 2A N.J. Singer & J.D. Singer, *Sutherland Statutes and Statutory Construction* § 48A:11 (7th ed. 2008) ("In reviewing legislative history, the Court consults . . . committee reports, floor debates, hearings, rejected proposals, and even legislative silence.").

In examining § 2, we are required to comply with "the cardinal rule that a statute is to be read as a whole," *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221, 112 S.Ct. 570, 116 L.Ed.2d 578 (1991). As "the meaning of statutory language, plain or not, depends on context," *id.*, we must "look not only to the particular statutory language, but to the design of the statute as a whole

and to its object and policy." *Dada v. Mukasey*, __ U.S. __, 128 S.Ct. 2307, 2317, 171 L.Ed.2d 178 (2008) (quoting *Gozlon-Peretz v. United States*, 498 U.S. 395, 407, 111 S.Ct. 840, 112 L.Ed.2d 919 (1991)) (internal quotation marks omitted).

When we look at the terms of the original VRA as a whole, the context, and recognized sources of congressional intent, it is clear the original § 2 of the VRA of 1965 was not meant to create a cause of action against a state which disenfranchises its incarcerated felons. The purposes and congressional history of the 1982 amendments, as well as congressional action after 1982, further confirm our understanding that § 2 does not encompass this claim.

1. *The Original VRA of 1965*

The original VRA was enacted against the background of explicit constitutional and congressional[11] approval of state felon disenfranchisement laws and expressed no intention to invalidate such laws, but rather an intention to leave such laws untouched.

Prior to the enactment of the VRA, enforcement of the Fifteenth Amendment guarantee that the "right of citizens of the United States to vote shall not be denied or abridged . . . on account of race, color, or previous

11. Indeed, in re-admitting southern states to the Union following the Civil War, Congress approved new state constitutions containing felon disenfranchisement provisions. *Richardson*, 418 U.S. at 48-52, 94 S.Ct. 2655.

condition of servitude," U.S. Const. amend. XV, § 1, was unsatisfactory. *Nw. Austin*, 129 S.Ct. at *2508-09 .

In 1965, Congress enacted the VRA with the intent to "banish the blight of racial discrimination in voting, which ha[d] infected the electoral process in parts of our country for nearly a century." *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966). Plaintiffs' claim here concededly does not involve any such intent. The language of the original § 2 "tracked . . . the text of the Fifteenth Amendment," *Bartlett*, 129 S.Ct. at 1240. The Court emphasized this point when it said that the original § 2 did "no more than elaborate[ ]upon . . . the Fifteenth Amendment," *id.* at 1241 (omission in original) (quoting *City of Mobile v. Bolden*, 446 U.S. 55, 60-61, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980) (plurality opinion)) (internal quotation marks omitted). The VRA's original object was plainly to combat specific forms of racial discrimination.[12] Beyond § 2, the remainder of the VRA set up a scheme of stringent remedies to address the most flagrant practices. "[T]he Act directly pre-empted the most powerful tools of black disenfranchisement in the covered areas. All literacy tests and similar voting qualifications were abolished by § 4 of the Act." *Nw.*

12. Plaintiffs rely heavily on the Court's statement, in a vote dilution case, that Congress intended "to give the Act the broadest possible scope," *Allen v. State Bd. of Elections*, 393 U.S. 544, 567, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969) (interpreting the phrase "qualification . . . or procedure" in § 2(a)). This language in *Allen* must be understood in light of the Court's other statements in subsequent cases, including *Bolden* and *Bartlett*.

Austin, 129 S.Ct. at *2509, (citing Voting Rights Act of 1965, §§ 4(a)-(d), 79 Stat. 437, 438-439).

The legislative history of the VRA shows that Congress was not silent with respect to felon disenfranchisement laws. In fact, Congress explicitly considered the effect of the VRA on state felon disenfranchisement laws, and did so under § 4, rather than under § 2.[13] Section 4 of the VRA bans any "test or device" that impermissibly limits the franchise. 42 U.S.C. § 1973b(c). Congress, in enacting § 4(c) proscribed several categories of historically discriminatory tests or devices, including some literacy tests, educational achievement or knowledge tests, and good moral character qualifications. But Congress was careful to carve out from its proscription of tests for good moral character any and all state felon disenfranchisement laws. H.R.Rep. No. 89-439 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2547-57. In excluding felon disenfranchisement laws from the scope of § 4, Congress took the view that it did not consider such laws to be a discriminatory voter qualification or a "tool[ ] of black disenfranchisement." *Nw. Austin*, 129 S.Ct. at *2509.

The Senate Judiciary Committee Report explicitly stated that this § 4 prohibition on tests and devices "would not result in the proscription of the frequent requirement of States and political subdivisions that an applicant for voting or registration for voting be free of

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13. The 1965 legislative history indicates that Congress focused much more attention on the import of § 4 and § 5 than on § 2 of the VRA.

conviction of a felony or mental disability." S.Rep. No. 89-162 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2508, 2562 (joint views of Senators Dodd, Hart, Long, Kennedy, Bayh, Burdick, Tydings, Dirksen, Hruska, Fong, Scott, and Javits).

The House Report confirms the Senate's understanding. It stated that the VRA "does not proscribe a requirement of a State or any political subdivision of a State that an applicant for voting or registration for voting be free of conviction of a felony or mental disability." H.R.Rep. No. 89-439, *reprinted in* 1965 U.S.C.C.A.N. at 2457.

In drafting the VRA, Congress considered felon disenfranchisement statutes, and it viewed them as a potential test or device that fell within the purview of § 4 and not § 2. We are not free to second guess Congress's categorizations of felon disenfranchisement statutes. Further, Congress made clear that it did not purport to outlaw state felon disenfranchisement statutes based on their effect. Rather, under § 4, Congress enumerated and outlawed tests or devices it viewed as disqualifications excluding minority voters. Felon disenfranchisement laws were specifically removed from this category by Congress and were considered nondiscriminatory.

In light of this express history, Congress could not have intended to create a cause of action under § 2 of the VRA against disenfranchisement of incarcerated felons while saying explicitly elsewhere that it did not

intend to proscribe any such laws. Other courts agree with our conclusion. *Hayden*, 449 F.3d at 319 ("[I]t is apparent to us that Congress's effort to highlight the exclusion of felon disenfranchisement laws from a VRA provision that otherwise would likely be read to invalidate such laws is indicative of its broader intention to exclude such laws from the reach of the statute."); *see also Farrakhan*, 359 F.3d at 1120-21 (Kozinski, J., dissenting from denial of reh'g en banc).

This point is buttressed by another aspect of § 4. As drafted in 1965, § 4 applied to covered jurisdictions.[14] Congress would not have permitted felon disenfranchisement laws in covered jurisdictions where there was a history of discrimination, while prohibiting them in non-covered jurisdictions like Massachusetts. To subject felon disenfranchisement in a non-covered jurisdiction to a VRA cause of action while prohibiting such a cause of action for a covered jurisdiction would itself raise significant constitutional concerns. *See Nw. Austin*, 129 S.Ct. at *2513.

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14. Congress continued to revisit the discriminatory tests or devices banned by § 4. Later VRA amendments extended the § 4 ban on literacy tests nationwide. *See* Voting Rights Act Amendments of 1970, Pub.L. No. 91-285, § 201, 84 Stat. 314, 315 (current version at 42 U.S.C. § 1973aa) (extending temporary ban to entire nation); Voting Rights Act Amendments of 1975, Pub.L. No. 94-73, § 201, 89 Stat. 400, 400-01 (current version at 42 U.S.C. §§ 1973b-1973c) (making the temporary nationwide ban permanent). Congress never changed its view that felon disenfranchisement laws were not within the reach of the VRA.

If there were any doubt as to Congress's intent not to create a cause of action against laws like Article 120, other actions show congressional acceptance of even broader felon disenfranchisement laws than involved here, reinforcing the conclusion that § 2 was not meant to proscribe laws such as Article 120. In 1971, just six years after passing the VRA, Congress affirmatively enacted a broader felon disenfranchisement statute covering both imprisoned and paroled felons in the District of Columbia, over which it then exercised plenary power. Act of Dec. 23, 1971, Pub.L. No. 92-220, § 4, 85 Stat. 788, 788; *see also Hayden*, 449 F.3d at 315. Congress would not have prohibited states from imposing such disqualifications when it imposed them itself on the District.

Further, between the passage of the VRA in 1965 and the 1982 amendments, Congress considered and rejected proposals to amend the VRA[15] to prohibit certain types of state felon disenfranchisement laws. Congress understood that the VRA, as enacted in 1965, did not permit claims against state felon disenfranchisement laws and that amendment of the VRA would be needed to permit such suits, and it declined to make those amendments. Two points are important. First, Congress rejected each those

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15. The 1975 Amendments to the VRA added protections for linguistic minorities and permanently banned literacy tests. 1975 Amendments §§ 203, 207, 89 Stat. at 401-02 (codified as amended at 42 U.S.C. §§ 1973b(f), 1973l(c)(3)). Nothing in those amendments indicated any intent to broaden the VRA to permit suits against state laws disenfranchising incarcerated felons.

proposed amendments. Second, even those rejected amendments would have precluded suits raising claims of disenfranchisement of a "citizen [who] is confined in a correctional facility at the time of such . . . election," as does Article 120 now at issue. *See Ex-Offenders Voting Rights: Hearing on H.R. 9020 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the H. Comm. on the Judiciary*, 93d Cong. 4 (1974).

In 1972, the House Judiciary Committee held hearings on "The Problems of the Ex-Offender." *See Corrections, Part VI, Illinois: The Problems of the Ex-Offender: Hearing Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 92d Cong. (1972). In response to these hearings, several prominent VRA advocates in Congress jointly introduced a bill designed "to amend the [VRA] to prohibit the States from denying the right to vote in Federal elections to *former* criminal offenders who have not been convicted of any offense related to voting or elections *and who are not confined in a correctional institution.*" *Hayden*, 449 F.3d at 319 (emphasis added) (quoting H.R. 15,049, 92d Cong. (1972)) (internal quotation marks omitted). The bill did not result in legislation. *Id.*

Similarly, Congress held hearings in 1973 expressly addressing but not adopting proposed amendments to the VRA to allow challenges to felon disenfranchisement for only that category of ex-offenders who were not

imprisoned.[16] *See Ex-Offenders Voting Rights: Hearing on H.R. 9020*, *supra*, 93d Cong. 1-38; *see also Hayden*, 449 F.3d at 319.

Plaintiffs' claim that § 2 as drafted in 1965 permits a cause of action against Article 120 fails.

2. *The 1982 Amendments*

We reject plaintiffs' position that § 2(b), added in 1982, may not be considered in analyzing whether they have a claim under § 2(a).[17] Furthermore, we conclude that those

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16. The proposed amendment would have authorized "the Attorney General . . . to institute in the name of the United States such actions against States . . . including actions for injunctive relief, as he may determine to be necessary to implement the purposes of this title." *Ex-Offenders Voting Rights: Hearing on H.R. 9020*, *supra*, at 4 (quoting H.R. 9020, 93d Cong. (1973)).

17. Under Supreme Court and circuit precedent, we read both § 2(a) and § 2(b) together and resort to legislative history. The text of § 2(b) is explicit that its purpose is to give content and context to the terms used in § 2(a). The Supreme Court has interpreted both sections together. *See Bartlett*, 129 S.Ct. at 1241 ("The 1982 amendments . . . added . . . § 2(b), providing a test for determining whether a § 2 violation has occurred."); *Chisom*, 501 U.S. at 395, 111 S.Ct. 2354 ("The two purposes of the amendment [to § 2] are apparent from its text. Section (a) adopts a results test. . . . Section (b) provides guidance about how the results test is to be applied.").

This court's precedent also requires we read §§ 2(a) and 2(b) together and in light of history and context. *See Metts*, 363 F.3d at 10 ("The Delphic language of the [1982] amendment [to

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amendments, while altering the law as to vote dilution claims and perhaps as to other claims (which we need not decide), undercut plaintiffs' arguments that Congress intended the VRA to reach laws disenfranchising incarcerated felons.

The 1982 amendments did not alter the prior understanding that the VRA did not reach the disenfranchisement of currently incarcerated felons. When "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the [administrative or judicial] interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard v. Pons*, 434 U.S. 575, 581, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978). Nothing in the text, context,[18] or history supports plaintiffs' position.

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§ 2] can be understood only against the background of its legislative history and subsequent Supreme Court interpretation.").

18. The context of the 1982 amendments confirms our understanding that § 2 was not amended in isolation from the rest of the statute and must be read in conjunction with the other sections, including § 4. The 1982 amendments to § 2 arose in the wake of *Bolden* because § 5 of the VRA was scheduled for reauthorization in that year by the terms of the 1975 VRA amendments. S. Issacharoff et al., *The Law of Democracy* 713-14 (rev.2d ed.2002). Indeed, in the House, most debate focused on the structure of the preclearance and bailout provisions of the VRA, while less attention focused on the § 2 amendments. *Id.* at 716; *see also* T.M. Boyd & S.J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 Wash. & Lee L.Rev. 1347 (1983).

The Supreme Court held that "Congress amended § 2 of the VRA to make clear that *certain* practices and procedures that result in the denial or abridgement of the right to vote are forbidden even though the absence of proof of discriminatory intent protects them from constitutional challenge." *Chisom*, 501 U.S. at 383-84, 111 S.Ct. 2354 (emphasis added); *Johnson*, 405 F.3d at 1228. Felon disqualification was not among those certain practices and procedures.

Plaintiffs admirably admit that Congress's specific purpose in amending § 2 of the VRA[19] was to overrule certain aspects of the Supreme Court's decision in *Bolden*, which was concerned with vote dilution claims, not direct denial claims. We explain. Prior to *Bolden*, in *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d

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19. Congress was clear about its intent. The Senate Report states:

> This Amendment is designed to make clear that proof of discriminatory intent is not required to establish a violation of Section 2. It thereby restores the legal standards, based on the controlling Supreme Court precedents, which applied in voting discrimination claims prior to the litigation involved in *Mobile v. Bolden*. The amendment also adds a new subsection to Section 2 which delineates the legal standards under the results test by codifying the leading pre- *Bolden* vote dilution case, *White v. Regester*. *See* S.Rep. No. 97-417, at 2, *reprinted in* 1982 U.S.C.C.A.N. 177, 179; *see also id.* at 27, *reprinted in* 1982 U.S.C.C.A.N. at 205 ("The 'results' standard is meant to restore the pre- *Mobile* legal standard which governed [vote dilution cases].").

314 (1973), minority plaintiffs had successfully challenged a state districting plan on vote dilution grounds. There, the Court did not require a showing of discriminatory intent. *See id.* at 766. By contrast, the *Bolden* plurality held that state action "that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose," 446 U.S. at 61, 100 S.Ct. 1490, and altered the *White* evidentiary standard in vote dilution cases to require direct evidence of discriminatory intent.[20] *See Bartlett*, 129 S.Ct. at 1240-41.

In 1982, Congress focused on reversing this aspect of *Bolden* and clarifying the standard for vote dilution claims. Congress aimed to reinstate the "results test," which had been the rule developed in the pre- *Bolden* case law for vote dilution claims under *White*. *See Metts*, 363 F.3d at 10 (stating the 1982 amendments made it clear that "discriminatory intent is not a necessary element in a violation and that Congress [instead] intended a broad range of factors to be taken into account"). But the reinstated, multifactored results test was not meant to extend to this limited felon disenfranchisement claim any more than the pre- *Bolden* tests were. Nothing in the legislative history of § 2(b) indicated any intent to expand the VRA to create a cause

20. The *Bolden* plurality also held that the "language of § 2 [of the VRA] no more than elaborates upon that of the Fifteenth Amendment, and the sparse legislative history of § 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself." 446 U.S. at 61, 100 S.Ct. 1490.

of action against a state felon disenfranchisement law such as Article 120. To the contrary, in enacting § 2, Congress noted that it was impossible to predict the variety of means that would be used to infringe on the right to vote and that the voting rights landscape was marked by innovation in discrimination. S.Rep. No. 89-162, at 5 (1965); S.Rep. No. 89-439, at 10. But these concerns do not go to felon disenfranchisement, which was neither a new innovation nor a predictable future innovation. Felon disenfranchisement was a well-known and accepted part of the voting landscape. "The Senate Report, which details many discriminatory techniques used by certain jurisdictions, made no mention of felon disenfranchisement provisions." *Johnson*, 405 F.3d at 1234; *see also* Tokaji, *supra*, at 707 ("The legislative history of the 1982 amendments thus shows that Congress was almost exclusively focused on vote dilution claims.").[21]

Further, the language of § 2(b) undercuts plaintiffs' assertion they have stated a claim under § 2(a). The text of subsection (b) protects a "class of citizens" who by law may and should enjoy as full an "opportunity [as] other members of the electorate to participate in the political process." § 1973(b). For a host of valid reasons, incarcerated prisoners cannot participate in the political process equally with free citizens outside the prison

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21. We need not reach the question of whether this amendment was meant to reach other types of § 2 claims than vote dilution claims; even if so, the amendments were not meant to create a cause of action against imprisoned felon disenfranchisement laws.

walls. *Hayden*, 449 F.3d at 342 (Jacobs, J., concurring). As noted by *Hayden*, "There is no question that incarcerated persons cannot 'fully participate in the political process'—they cannot petition, protest, campaign, travel, freely associate, or raise funds." *Id.* at 321.

Further, the 1982 Congress amended § 2 to assuage expressed fears that the courts would interpret a results test as a requirement for proportional representation in vote dilution cases, and therefore the statute was amended to expressly disclaim any right to proportional representation. § 1973(b) ("[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."); Tokaji, *supra*, at 705-06. This suggests that Congress was fundamentally concerned with remedying discrimination in voting, rather than guaranteeing proportionality in political representation. *See, e.g.*, S. Issacharoff, *Polarized Voting and the Political Process*, 90 Mich. L.Rev. 1833 (1992). Plaintiffs' claim, which is based on mere disproportionality in the prison population from felon disenfranchisement, does not implicate these concerns.

3. *Post-1982 Congressional Actions Assume the Validity of State and Federal Felon Disenfranchisement Laws*

Congressional action, both after 1982 and in the aftermath of *Bush v. Gore*, also undercuts the plaintiffs' reading of the amended § 2 to support a claim against

imprisoned felon disenfranchisement laws. These statutes show continuing congressional approval of state laws disenfranchising imprisoned felons. The National Voter Registration Act of 1993, which generally restricts states' ability to remove names from the voter rolls, explicitly exempts state decisions to disenfranchise individuals "by reason of criminal conviction." 42 U.S.C. § 1973gg-6(a)(3)(B). The Help America Vote Act of 2002 directs states to remove disenfranchised felons from their lists of those eligible to vote in federal elections. 42 U.S.C. § 15483(a)(2)(A)(ii)(I). These two recent statutes are entirely inconsistent with reading § 2, whatever its breadth, to create a cause of action against Article 120.

Further, Congress has continued to consider and reject numerous proposals to require states to enfranchise even former felons. Even these efforts have expressly excluded currently incarcerated felons. *See, e.g., Civic Participation and Rehabilitation Act of 1999: Hearing on H.R. 906 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. 1, 3 (2000) (quoting H.R. 906, 106th Cong. (1999)).[22]

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22. The Civic Participation and Rehabilitation Act would have restored the voting rights of ex-felons, but not imprisoned felons, in federal elections. H.R. 906 was not drafted as an amendment to the VRA, but contained a savings clause clarifying that the measure operated in addition the VRA and the National Voter Registration Act. *Civic Participation and Rehabilitation Act of 1999: Hearing on H.R. 906, supra*, at 4. A number of recent unsuccessful bills are consistent with H.R.

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Appendix A

Congress has excepted from the reach of the VRA protections from vote denial for claims against a state which disenfranchises incarcerated felons. We do not need to decide[23] what is needed to prove a denial (as

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906's proposal to restore the rights of only *former* felons. And even these have been flatly rejected by Congress. *See, e.g.*, Democracy Restoration Act of 2008, S. 3640, 110th Cong. (2008); Democracy Restoration Act of 2008, H.R. 7136, 110th Cong. (2008); Count Every Vote Act of 2005, S. 450, 109th Cong. (2005); Ex-Offenders Voting Rights Act of 2005, H.R. 663, 109th Cong. (2005).

23. It is doubtful plaintiffs have articulated a viable § 2 direct denial theory, in any event. Plaintiffs have explained only that they think this claim falls within a broad reading of § 2, provided one ignores the text of § 4, the legislative history of the Act, and the purpose and context of § 2(b). But they have not explained even what their theory of liability is, what standards a court would apply, or what the components of a winning claim would be. This is the situation eight years after they filed suit and have had discovery from defendants.

The most plaintiffs have suggested is that despite the self-evident racial neutrality of depriving all incarcerated felons from voting while imprisoned, there may be some causal connection between being incarcerated for felonies and their race. But the very 1994 Commission Report on which they rely concludes that no such connection was shown. More than that, it concluded that if one wished to see if such a connection could be shown, the data simply did not exist to permit the testing of the hypothesis. When plaintiffs asked the defendant officials in discovery for data which would presumably assist them, the defendants said they did not have and did not keep such data.

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opposed to a dilution) claim under § 2 which is not a claim against a state provision disenfranchising imprisoned felons.[24]

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There is nothing else. Even if one were to look more broadly at the Senate factors so often used in vote dilution cases, *see* S.Rep. No. 97-417, at 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07, those factors do not aid plaintiffs.

Further, given our disposition of the case, we need not reach the concerns raised by Judge Kozinski about the role of evidence of statistical disparities in § 2 challenges. *Farrakhan*, 359 F.3d at 1119 (Kozinski, J. dissenting from denial of reh'g en banc); *see also Ricci v. DeStefano*, __ U.S. __, 129 S.Ct. 2658, 2678, 174 L.Ed.2d 490 (2009) (reliance on threshold showing of a raw statistical disparity in test results is not strong evidence of disparate impact).

24. Some have commented on a "potential tension in the case law [because] . . . section 2 [from 1982 onward] had been used almost entirely for vote dilution claims [while] [t]he felon disenfranchisement cases involve an older kind of claim involving access to the ballot itself; such cases involve not vote dilution but vote denial." S. Issacharoff et al., *The Law of Democracy* 140 (rev.2d ed. Supp.2006); *see* Tokaji, *supra*, at 709 ("While *Gingles* and its progeny have generated a well established standard for vote dilution, a satisfactory test for vote denial cases under Section 2 has yet to emerge . . . . [and] the Supreme Court's seminal opinion in *Gingles* . . . is of little use in vote denial cases."); Karlan, *supra*, at 122 ("[T]he second generation of voting rights activity address the problem of racial vote dilution rather than outright disenfranchisement."); A.A. Peacock, *From Beer to Eternity, in Redistricting in the New Millennium* 119, 125 (P.F. Galderisi ed., 2005) 119, 125 (same).

Given the historic legitimacy of felon disenfranchisement, the constitutional recognition of the authority of states to disenfranchise imprisoned felons, the congressional recognition of that authority and the express congressional statements that the VRA was not meant to proscribe that authority, this is not the case in which to test the standards for other types of purported direct disenfranchisement claims. While our emphasis is somewhat different, we agree with the Second Circuit in *Hayden* that the seven circumstances it identifies all necessitate the conclusion that the this claim is not actionable. 449 F.3d at 315-16.

Plaintiffs have failed to state a claim under VRA § 2. We have no need to reach the serious constitutional questions which the Commonwealth argues would be raised were we to adopt plaintiffs' construction of the statute. In *Northwest Austin*, the Supreme Court emphasized the principle that courts, particularly in VRA cases, should avoid deciding constitutional issues where statutory interpretation obviates the issue, as here. *Nw. Austin*, 129 S.Ct. at *2508 ("Our usual practice is to avoid the unnecessary resolution of constitutional questions."); *see also Hayden*, 449 F.3d at 328 n. 24; *Johnson*, 405 F.3d at 1230.

Appendix A

III.

EX POST FACTO CLAUSE CLAIM

We turn to plaintiffs' appeal from the district court's grant of summary judgment in favor of the Commonwealth on the Ex Post Facto Clause arguments. There are no material facts in dispute in the record.

Plaintiffs argue the Ex Post Facto Clause was violated because "the only plainly discernible purpose for Article 120 was to seek to impose an additional measure of punishment upon those who had violated the laws of the Commonwealth." Plaintiffs point to the a transcript of the debates at the 1998 and 2000 Constitutional Conventions over the bill that ultimately became Article 120. Plaintiffs also rely on language from Acting Governor Cellucci's proposed amendment and his statements to the public, an amendment which was not accepted. These statements include: "The time has come to tell would-be criminals in Massachusetts that committing crimes has serious consequences," and that "[p]risons are a place for punishment." Even though his initial proposal was never in fact acted on by the legislature, we consider his comments as part of the background.

Analysis of the Ex Post Facto Clause claim involves a two-part inquiry. The first asks whether the denial of the right to vote is a civil, regulatory measure within the meaning of the caselaw, or whether it is punitive. "[W]here unpleasant consequences are brought to bear

upon an individual for prior conduct," the central question "is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation." *De Veau v. Braisted*, 363 U.S. 144, 160, 80 S.Ct. 1146, 4 L.Ed.2d 1109 (1960) (holding that state statutory bans against employment of convicted felons in certain jobs did not impose punishment under Ex Post Facto Clause). Only a punitive measure can violate the Ex Post Facto Clause. *See, e.g., Smith v. Doe*, 538 U.S. 84, 92, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003); *see also United States v. Salerno*, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) (holding preventative detention under the Bail Reform Act was permissible because it was regulatory and preventative, rather than punitive).

The Supreme Court has stated that felon disenfranchisement provisions are considered regulatory rather than punitive. In *Trop v. Dulles*, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958), the Court explained:

> [A] statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose. . . . The point may be illustrated by the situation of an ordinary felon. A person who commits a bank robbery, for instance, loses his right to liberty and often his right to vote. If, in the exercise of the power to protect banks, both sanctions were

> imposed for the purpose of punishing bank robbers, the statutes authorizing both disabilities would be penal. But because the purpose of the latter statute is to designate a reasonable ground of eligibility for voting, this law is sustained as a nonpenal exercise of the power to regulate the franchise.

Id. at 96-97, 78 S.Ct. 590; *see also Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 51, 79 S.Ct. 985, 3 L.Ed.2d 1072 (1959) (criminal record is an "obvious" factor that "a State may take into consideration in determining the qualifications of voters"). Article 120 is no exception.

Even if the Supreme Court had not already described such regulation of the franchise with respect to incarcerated felons as nonpenal, we would still find Article 120 to be a civil regulatory scheme. In examining Article 120 "on its face," *Hudson v. United States*, 522 U.S. 93, 100, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997), there is no language indicating the Commonwealth's provision is penal. Article 120 is not in the Commonwealth's criminal code, but rather its civil constitutional and statutory voter qualification provisions. *See Hendricks*, 521 U.S. at 361, 117 S.Ct. 2072, ("[The State's] objective to create a civil proceeding is evidenced by its placement of the Act within the [State's] probate code, instead of the criminal code" (citations omitted)). Article 120 also disenfranchises persons under guardianship, persons disqualified because of corrupt elections practices, and all persons under eighteen years of age, as well as

incarcerated felons. And the disqualification is enforced civilly, not criminally.

Article 120 does not involve a more general period of disenfranchisement because of commission of a felony; rather Article 120 is limited to the period of incarceration. Article 120 thus creates a temporary qualification on the right to vote coincident with imprisonment, rather than a long-term consequence for the commission of a crime.

Article 120 is a constitutional amendment, which was later effectuated and extended by statute. The voters of Massachusetts ratified Article 120 in a statewide election. The Voter Guide read by the voters, which we described earlier, made no mention of any goal of punishing prisoners. "The Ex Post Facto Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences." *Smith*, 123 S.Ct. at 1153.

Secondly, even if the legislature intended to deem a particular law "civil," courts must further inquire whether "the statutory scheme was so punitive either in purpose or effect as to negate that intention." *United States v. Ward*, 448 U.S. 242, 248-49, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980). " '[O]nly the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Hudson*, 522 U.S. at 100, 118 S.Ct. 488 (quoting *Ward*, 448 U.S. at 249, 100 S.Ct. 2636). Plaintiffs fail to meet this standard.

We review whether plaintiffs' allegations of punitive purpose meet the non-exclusive factors test set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963), and followed in *Smith*, 538 U.S. at 97, 123 S.Ct. 1140.

The *Mendoza-Martinez* factors are: (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment-retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether there is a rational connection to a nonpunitive purpose; and (7) whether it appears excessive in relation to the alternative purpose assigned. *Mendoza-Martinez*, 372 U.S. at 168-69, 83 S.Ct. 554. The most relevant factors are whether felon disenfranchisement "has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose." *Smith*, 538 U.S. at 97, 123 S.Ct. 1140.

First, Article 120 does not impose any affirmative disability or restraint, physical or otherwise. *See Smith*, 538 U.S. at 100, 123 S.Ct. 1140 ("[I]mprisonment . . . is the paradigmatic affirmative disability or restraint."). Disenfranchisement during the period of incarceration imposes no additional term of imprisonment, *see Flemming v. Nestor*, 363 U.S. 603, 617, 80 S.Ct. 1367,

4 L.Ed.2d 1435 (1960), and is not as enduring as permanent occupational debarment, which the Court has held is nonpunitive. *Hudson*, 522 U.S. at 104, 118 S.Ct. 488; *De Veau*, 363 U.S. at 144, 80 S.Ct. 1146; *Hawker v. New York*, 170 U.S. 189, 18 S.Ct. 573, 42 L.Ed. 1002 (1898) (revocation of a medical license does not violate Ex Post Facto clause).

Second, felon disenfranchisement has historically not been regarded as punitive in the United States, as the Supreme Court indicated in *Trop v. Dulles*. Indeed, in holding that felon disenfranchisement has "affirmative sanction" in § 2 of the Fourteenth Amendment of the U.S. Constitution, *Richardson*, 418 U.S. at 54, 94 S.Ct. 2655, the Supreme Court noted the historical *prevalence* of state felon disenfranchisement laws and never characterized even California's broad disqualification of former felons as punitive. *Id.* at 55, 94 S.Ct. 2655.

As to the third and fifth factors, Article 120 is effective regardless of a finding of scienter or the type of crime so long as it is a felony. That Article 120 may be "tied to criminal activity" is "insufficient to render the statut[e] punitive." *United States v. Ursery*, 518 U.S. 267, 291, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996).

The fourth *Mendoza-Martinez* factor considers whether felon disenfranchisement will promote the traditional aims of punishment, retribution and deterrence, to see whether plaintiffs have offered the clearest proof to overcome the statement of nonpenal

purpose. Plaintiffs rely on some statements made by some legislators that could be viewed as retributive, such as that felons "don't deserve to vote." To the extent the legislators' comments are relevant, they are sporadic and do not clearly evince a retributive purpose. More significantly, since Article 120 was put before the voters, the Information for Voters Guide is a better source of context. The Guide contained a balanced debate about the merits of allowing currently incarcerated felons to vote in state elections, noted the problem of prisoners being able to affect the laws under which they were confined by voting, and nowhere suggests an intent to punish prisoners.

As to the sixth factor, there is an obvious rational nonpunitive purpose for disenfranchisement: as the Guide shows, voters were concerned about the influence of currently incarcerated felons in "exercis[ing] control over [their] lives by voting from prison." *See also Smith*, 123 S.Ct. at 1147 (noting that "even if the objective of the Act is consistent with the purposes of the [state] criminal justice system, the State's pursuit of it in a regulatory scheme does not make the objective punitive."). Finally, Article 120 is not excessive in accomplishing this purpose. Article 120 does not violate the Ex Post Facto Clause.

IV.

The entry of judgment against the plaintiffs' Ex Post Facto Clause claim is affirmed; the court's denial of the motion to dismiss the VRA claim is reversed and the case is remanded to the district court for dismissal of both claims with prejudice. Each side shall bear its own costs.

So ordered.

TORRUELLA, Circuit Judge (Dissenting). Lest we be misled by the majority's choice of emphasis, this is *not* a case about the state's authority to disenfranchise convicted felons, nor about the popularity or desirability of that practice. Were that the issue before us, I too would be in the majority, as the validity of felon disenfranchisement laws, as a general matter, has been established. *See Richardson v. Ramirez*, 418 U.S. 24, 56, 94 S.Ct. 2655, 41 L.Ed.2d 551 (1974). Moreover, were that the issue before us, it would not have spawned reams of conflicting opinions, vigorous dissents and en banc reversals among our sister circuits.[25]

Rather this is a case about interpreting a clearly worded congressional statute, the Voting Rights Act of 1965 ("VRA"), according to its terms, when there is no

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25. *Compare Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir.2003) (holding that § 2 of the VRA applies to felon disenfranchisement statutes); *Johnson v. Governor of Fla.*, 353 F.3d 1287 (11th Cir.2003) (same); *Baker v. Cuomo*, 58 F.3d 814 (2d Cir.1995) (same); *Howard v. Gilmore*, No. 99-2285, 2000 WL 203984, at *1 (4th Cir. Feb.23, 2000)(assuming without expressly deciding that § 2 of the VRA applies to felon disenfranchisement laws and evaluating plaintiff's vote dilution claim thereunder); *Wesley v. Collins*, 791 F.2d 1255 (6th Cir.1986) (same) *with Hayden v. Pataki*, 449 F.3d 305 (2d Cir.2006) (en banc) (reversing its previous decision and denying coverage under the § 2 of the VRA for felon disenfranchisement statutes); *Johnson v. Governor of Fla.*, 405 F.3d 1214 (11th Cir.2005) (en banc) (same); *Baker v. Pataki*, 85 F.3d 919 (2d Cir.1996) (en banc) (dividing evenly on the question of whether felon disenfranchisement claim can proceed under § 2 the VRA, thus reinstating the district court decision dismissing the claim).

persuasive reason to do otherwise. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. __, 129 S.Ct. 2504, 2513, 174 L.Ed.2d 140 (2009) ("The Fifteenth Amendment empowers 'Congress,' not the [c]ourt[s], to determine in the first instance what legislation is needed to enforce it."). It is also a case about the constitutional validity of altering the legal consequences for committing a crime, long after the crime's completion. Because I disagree with the majority's resolution of both of these novel issues, I respectfully dissent.

I. Voting Rights Act Claim

Section 2 of the VRA, as amended in 1982, plainly provides that "*[n]o voting qualification* or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State . . . in a manner which *results* in a denial or abridgement of the right ... to vote on account of race or color. . . ." 42 U.S.C. § 1973(2)(a) (emphasis added); *see also Nw. Austin*, 557 U.S. __, 129 S.Ct. 2504, 2508. Notably, § 2(a) employs a " 'results' " test, under which proof of discriminatory intent is not necessary to establish a violation of the section. *Chisom v. Roemer*, 501 U.S. 380, 395, 111 S.Ct. 2354, 115 L.Ed.2d 348 (1991). Rather, plaintiffs can state a § 2 claim by showing that under the "totality of circumstances," a "certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 43-44, 106 S.Ct. 2752,

92 L.Ed.2d 25 (1986).[26] The allegations in plaintiffs' complaint, which we must accept as true at this preliminary stage, *see Pérez-Acevedo v. Rivero-Cubano*, 520 F.3d 26, 29 (1st Cir.2008), are that Massachusetts' Article 120, which disqualifies incarcerated felons from voting in the Commonwealth, has a disproportionately adverse effect on the voting rights of African-Americans and Hispanic-Americans, who are over-represented in the incarcerated felon population. Plaintiffs allege that this disparate impact is caused, in part, by racial and

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26. Among the non-exhaustive factors listed by the Senate as relevant to assessing the validity of a voter qualification is "the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process." S.Rep. No. 94-417, at 29 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 207. The ultimate inquiry, according to the Senate Report is "whether, in the particular situation, the practice operated to deny the minority plaintiff an equal opportunity to participate and to elect candidates of their [sic] choice." *Id.* at 30. The Ninth Circuit, applying this test, has explicitly held that evidence of racial bias in the criminal justice system is a relevant "social and historical condition" for purposes of the totality of the circumstances test, reasoning that "such discrimination would clearly hinder the ability of racial minorities to participate effectively in the political process as disenfranchisement is automatic." *Farrakhan*, 338 F.3d at 1020; *see also Nipper v. Smith*, 39 F.3d 1494, 1513-14 (11th Cir.1994) (en banc) (holding that the existence of racial bias in the community is relevant to a § 2 claim). "Thus, racial bias in the criminal justice system may very well interact with voter disqualifications to create the kinds of barriers to political participation on account of race that are prohibited by Section 2." *Farrakhan*, 338 F.3d at 1020.

ethnic bias in the Massachusetts court system, and operates to deny these racial minorities the right to vote, in violation of § 2 of the VRA. Plaintiffs further allege that when enacting Article 120, Massachusetts legislators were aware of the data regarding racial bias in the criminal justice system.[27]

The felon disenfranchisement provision at issue is clearly a "voting qualification." Whether or not this provision results in the denial of the right to vote "on account of race or color" under the "totality of the circumstances" remains the ultimate question for the trier of fact. But "[e]ven if serious problems lie ahead in applying the 'totality' of the circumstances standard described in [VRA] § 2(b), that task, difficult as it may prove to be, cannot justify a judicially created limitation on the coverage of the broadly worded statute, as enacted and amended by Congress." *Chisom*, 501 U.S. at 403, 111 S.Ct. 2354. Plaintiffs have stated a claim sufficient to preclude dismissal at this preliminary stage and are entitled to the opportunity to develop it.

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27. Notably, bearing on the question of plausibility of plaintiffs' claim, one scholar has found that an analysis of the factors inducing states to impose or eliminate felon disenfranchisement provisions concluded that "[s]tates with greater nonwhite prison populations have been more likely to ban convicted felons from voting than states with proportionally fewer non-whites in the criminal justice system." Angela Behrens, et al., *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States*, 1850-2002, 109 Am. J. Soc. 559, 596 (2003).

In order to avoid this obvious result, the majority makes an expansive and unwarranted holding. It holds that despite the broad language of VRA § 2, covering all "voting qualifications," Congress actually never intended for felon disenfranchisement laws, even discriminatory ones, to be challengeable under that provision. It does so by disregarding the plain and unambiguous text of the statute and resorting to a collection of secondary evidence, none of which stand for the proposition the majority seeks to establish. In the face of so startling a holding, I am left wondering, in the words of Judge Calabresi, "[w]hat is behind this remarkable decision to buck text, context, and legislative history in order to insulate a particular racially discriminatory practice from an anti-discrimination rule of general applicability?" *Hayden*, 449 F.3d at 365 (Calabresi, J., dissenting).

The fatal flaw in the majority's reasoning begins with its improper reliance on legislative history given the plain and unambiguous language of § 2(a), the section of the VRA governing the central "applicability" question before us. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997) ("Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning *with regard to the particular dispute in the case*." (emphasis added)). The plain language of § 2(a) unambiguously applies to *all* "voting qualifications." 42 U.S.C. § 1973. A provision disqualifying incarcerated felons, listed among the provisions of the Massachusetts Constitution governing

qualifications to vote, clearly constitutes a "voting qualification." Therefore, where it is alleged, as here, that this "qualification" is being applied "in a manner which results" in the denial of the right to vote on account of race, a cognizable VRA claim has been stated. *Id.* As the text of the statute unambiguously manifests its meaning, there was no need to go any further in order to conclude that plaintiffs have stated a cognizable claim under § 2 of the VRA.

This is the reasoning upon which the Ninth Circuit decision, holding that an identical VRA claim had been stated in that Circuit, starts and ends. *See Farrakhan*, 338 F.3d at 1016 ("Plaintiff's claim of vote denial [resulting from Washington's felon disenfranchisement law] is cognizable under Section 2 of the VRA because '[f]elon disenfranchisement' is a voting qualification, and Section 2 is clear that *any* voting qualification that denies citizens the right to vote in a discriminatory manner violates the VRA" (emphasis added)).[28] As Judge Sotomayor similarly explained in her powerful dissenting opinion in *Hayden:*

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28. The majority attempts to distinguish *Farrakhan* on the ground that the Washington provision at issue in that case was "not as narrow as this one." I, however, see no meaningful difference between disenfranchising felons until the completion of their sentences as under the Washington statute, or only while incarcerated, as in the case before us. In any event, the narrowness or breadth of a particular felon disenfranchisement scheme bears *no relevance* upon the question of whether challenges to these types of laws are cognizable under the VRA.

> It is plain to anyone reading the Voting Rights Act that it applies to all 'voting qualifications.' And it is equally plain that [the felon disenfranchisement provision at issue] disqualifies a group of people from voting. These two propositions should constitute the entirety of our analysis.

449 F.3d at 367-68; *see also Johnson*, 405 F.3d at 1247 (Barkett, J., dissenting) ("[Plaintiffs'] contention that Florida's felon disenfranchisement law effectively denies their right to vote because they are black is clearly encompassed by the plain language of the VRA.").

The majority cannot dispute "the traditional rule that where the plain text of the statute is unmistakably clear on its face, there is no need to discuss legislative history." *Succar v. Ashcroft*, 394 F.3d 8, 31 (1st Cir.2005) (Lynch, J.) (quoting *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 481, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999)). While the majority cites *Nken v. Holder*, __ U.S. __, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009) for the general proposition that statutory interpretations turns on language as well as context, *id.* at 1756, neither *Nken* nor the case upon which it relies addressed a statute whose plain meaning is as evident and clear on its face as the one before us. In fact, contrary to the majority's contention, even with complicated statutory schemes like the VRA, courts have not hesitated to rely on the plain language of the text, where the text plainly answers the very question before them. *See, e.g., Lopez v. Monterey County*, 525 U.S. 266, 278-79, 119 S.Ct. 693, 142 L.Ed.2d

728 (1999); *Chisom*, 501 U.S. at 396, 111 S.Ct. 2354. There is simply no support in our precedent for disregarding so plain and unambiguous a statutory mandate based on nothing more than our own assumption that Congress did not mean what it said. *See BedRoc Ltd., LLC*, 541 U.S. at 183, 124 S.Ct. 1587 (explaining that absent ambiguity we are bound by the "preeminent canon of statutory interpretation [that] requires us to presume that [the] legislature says in a statute what it means and means in a statute what it says there" (internal quotation marks omitted)); *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 83, 53 S.Ct. 42, 77 L.Ed. 175 (1932) (quoting *Hamilton v. Rathbone*, 175 U.S. 414, 421, 20 S.Ct. 155, 44 L.Ed. 219 (1899) for proposition that legislative history may be resorted to in order "to *solve*, but not to *create*, an ambiguity" (emphasis added)); *Ruiz v. Bally Total Fitness Holding Corp.*, 496 F.3d 1, 8 (1st Cir.2007) (explaining that we "are not free to disregard the plain language of a statute and, instead, conjure up legislative purposes and intent out of thin air").

Though it is unable to point to any actual textual ambiguity, the majority nevertheless makes a conclusory assertion that "[t]he language of § 2(a) is both broad and ambiguous." Breadth, however, does not render a statute ambiguous. *See BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 187 n. 8, 124 S.Ct. 1587, 158 L.Ed.2d 338 (2004) ("Where a law is plain and unambiguous, *whether it be expressed in general or limited terms*, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for

construction." (emphasis added & citation omitted)); *Diamond v. Chakrabarty*, 447 U.S. 303, 315, 100 S.Ct. 2204, 65 L.Ed.2d 144 (1980) ("Broad general language is not necessarily ambiguous when congressional objectives require broad terms."). Rather, "a statute is ambiguous only if it admits of more than one reasonable interpretation." *United States v. Vidal-Reyes*, 562 F.3d 43, 51 (1st Cir.2009) (quoting *United States v. Godin*, 534 F.3d 51, 56 (1st Cir.2008)). But "[c]onspicuously absent from the majority opinion is so much as a hint of an intelligible reading under which [the felon disenfranchisement provision] is not a 'voting qualification or prerequisite to voting or standard, practice or procedure.' (What else on earth could [the provision] possibly be?)". *Hayden*, 449 F.3d at 346 (Parker, J., dissenting). There is simply no reasonable interpretation of § 2 under which a felon disenfranchisement law would not be a "voting qualification or prerequisite to voting" actionable thereunder.[29]

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29. We acknowledge that § 2(b) of the VRA, containing a "totality of the circumstances" test for proving a violation of § 2(a), may require further interpretation. However, any ambiguity in § 2(b) is irrelevant to whether a felon disenfranchisement provision is a voting qualification governed by the Act—a question which the plain language of § 2(a) unambiguously answers in the affirmative. *See Robinson*, 519 U.S. at 340, 117 S.Ct. 843 (identifying the relevant question as "whether the language at issue has a plain and unambiguous meaning *with regard to the particular dispute in the case.*" (emphasis added)).

Given the clarity of the VRA language, which plainly encompasses the claim before us, the majority's resort to secondary sources to justify its contrary result constitutes a "radical abandonment of our longstanding precedents that permit resort to legislative history only when necessary to interpret ambiguous statutory text." *Id.* at 187 n. 8, 124 S.Ct. 1587. I cannot endorse this impermissible practice. But even if, for the sake of argument, I take up the majority's invitation to investigate history and context, I find that *none* of the evidence cited by the majority indicates congressional intent to exclude felon disenfranchisement laws from § 2's purview so as to justify departing from the plain language of that provision. In fact, my reading of the legislative history is that it *confirms* the plain meaning of the text.

One need not delve too deeply into the legislative history to discover that Congress enacted the Voting Rights Act of 1965 pursuant to its powers to enforce the Fifteenth Amendment for the "broad remedial purpose of 'rid[ding] the country of racial discrimination in voting.' " *Chisom*, 501 U.S. at 403, 111 S.Ct. 2354 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 315, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966)); *see also Nw. Austin*, 557 U.S. __, 129 S.Ct. 2504, 2508-09.[30] At that

30. Notably, despite its insistence on resorting to secondary sources to ascertain congressional intent, the majority places curiously little emphasis on the historical and policy considerations that prompted Congress to pass into law the very statute whose meaning it endeavors to ascertain.

time, although the Fifteenth Amendment guaranteeing the right to vote without regard to race or color had been in effect for nearly a hundred years, and thus, intentional discrimination was already prohibited, states continued to devise facially "neutral" devices such as gerrymandering, poll taxes, literacy tests and grandfather clauses, which, coupled with violence and intimidation, served to effectively bar minorities from access to the polls and preclude the Fifteenth Amendment's promise of racial equality in voting from becoming a reality. *See Nw. Austin*, 557 U.S. __, 129 S.Ct. 2504, 2508-09 (describing "the first century of congressional enforcement of the [Fifteenth] Amendment" as a "failure" and noting the "creativ[ity] [of states] in 'contriving new rules' to continue violating the Fifteenth Amendment" (quoting *Katzenbach*, 383 U.S. at 335, 86 S.Ct. 803)); Andrew L. Shapiro, Note, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 Yale L.J. 537, 543 (1993). Accordingly, the text of the original § 2 "tracked, in part, the text of the Fifteenth Amendment." *Bartlett v. Strickland*, __U.S. __, 129 S.Ct. 1231, 1240, 173 L.Ed.2d 173 (2009). While the legislative history of § 2 of the VRA is silent on the particular question of felon disenfranchisement, that history *does* clearly indicate that Congress intentionally kept § 2(a) as broad as possible because it found it "impossible to predict the variety of means that would be used to infringe on the right to vote" and wanted to encompass all such measures that states could devise. *Johnson*, 405 F.3d at 1243 (Wilson, J., concurring in part and dissenting in part); *see also Katzenbach*, 383 U.S. at 335, 86 S.Ct. 803

(noting that "Congress knew that some of the States . . . had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees" and that "Congress had reason to suppose that these States might try similar maneuvers in the future"); H.R. Rep. 89-439, at 10 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437 (1965) (describing how, "even after defeat resisters s[ought] new ways and means of discriminating," and, as a result, rejected the case by case approach that "too often ha[d] caused no change in result, only in methods."). Thus, Congress intentionally chose the expansive language "voting qualifications or prerequisite to voting, or standard, practice, or procedure" for § 2 so as to be "all-inclusive of any kind of practice" that might be used by states to deny citizens that right. *Allen v. State Bd. of Elections*, 393 U.S. 544, 566-67, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969) (citing testimony from Senate Judiciary Committee Hearings on the VRA).[31] As the Supreme

31. Indicative of Congress's intent to give this prophylactic statute the broadest possible scope, it is notable that an earlier draft of § 2(a) used the slightly narrower language "qualification or procedure," but during Senate Hearings on the bill, one Senator expressed concern that the word 'procedure' was not broad enough to cover all the various practices that might effectively be employed to deny citizens their right to vote. *See Allen*, 393 U.S. at 566-67 & n. 8, 89 S.Ct. 817 (citing legislative history). In response, the Attorney General said he had no objection to expanding the language of the section, to be all-inclusive. *Id.* Congress then expanded the language in the final version of § 2 to include any " 'voting qualifications or prerequisite to voting, or standard, practice, or procedure.' " *Id.* (quoting 42 U.S.C. § 1973 (1964)).

Court has held, Congress intended the term "voting qualification" in § 2 to have the "broadest possible scope" and to reach "any state enactment which altered the election of a covered State in even a minor way." *Id.*, 393 U.S. at 566-67, 89 S.Ct. 817.[32]

"Criminal disenfranchisement is an outright barrier to voting that, like the poll tax and literacy test, was adopted in some states with racially discriminatory intent and has operated throughout our nation with racially discriminatory results." Shapiro, *supra*, at 543.[33]

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32. In fact, in his concurrence in *Holder v. Hall*, Justice Thomas acknowledged that § 2 of the VRA was broadly phrased "with an eye to eliminating the possibility of evasion." 512 U.S. 874, 917, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994) (Thomas, J., Concurring). Although Justice Thomas argued for a more restrictive interpretation of the scope of § 2 than the majority of the Supreme Court had recognized, his *more restrictive* interpretation of the provision was as follows:

> [T]he specific items described in § 2(a) . . . indicate that Congress was concerned in this section with *any procedure, however it might be denominated, that regulates citizens' access to the ballot*—that is, any procedure that might erect a barrier to prevent the potential voter from casting his vote.

Id. (emphasis added). Surely, felon disenfranchisement laws, which outright bar a segment of the population from voting, fall into this expansive category.

33. *See also* George Brooks, Comment, *Felon Disenfranchisement: Law, History, Policy and Politics*, 32 Fordham Urb. L.J. 851, 858 (2005) (noting that "[f]elon

(Cont'd)

Thus, these laws were precisely the type of potentially discriminatory qualification that Congress intended to subject to scrutiny under the VRA. Yet the majority definitively concludes that the VRA of 1965 was not meant to allow such an action against *any* felon disenfranchisement law.

The majority makes much of the fact that felon disenfranchisement was not specifically mentioned in the legislative history, but "it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute." *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 592, 100 S.Ct. 1889, 64 L.Ed.2d 525 (1980). It is also illogical to interpret silence as intent to exclude, given

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(Cont'd)

disenfranchisement was sometimes used as a tool by the states to disenfranchise blacks" and citing examples of states passing laws "disenfranchising those convicted of what were considered to be 'black' crimes, while those convicted of 'white' crimes did not lose their right to vote"); Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 Case W. Res. L.Rev. 727, 738 (1998) (describing how, during Reconstruction, in an effort to prevent African-Americans from voting, several states enacted felon disenfranchisement laws and "carefully selected disenfranchising crimes in order to disqualify a disproportionate number of black voters" and noting that "many of today's laws disenfranchising felons can trace their roots to attempts by Reconstruction constitutional conventions to enact laws that would keep black voters out of the electoral process").

that the very purpose of § 2's broad language was to avoid reciting the various maneuvers that states may devise in the course of their "unremitting and ingenious defiance." *Katzenbach*, 383 U.S. at 309, 86 S.Ct. 803. Rather, the VRA subjects *all* voting qualifications to scrutiny. In any event, if I were to read anything into that silence, I would reach the *opposite* conclusion. This is because felon disenfranchisement laws, which were undoubtedly among the mechanisms being employed by states throughout the post-reconstruction era to deprive minorities of the vote,[34] were inevitably within Congress's contemplation when drafting the VRA. Had Congress had intended to exclude this particular type of qualification from the reach of the statute, it could have done so explicitly. But Congress made no provisos to carve felon disenfranchisement laws out from the purposely "all inclusive" language of § 2(a). *See Allen*, 393 U.S. at 566, 89 S.Ct. 817. In this historical context, congressional silence suggests, if anything, that no such exclusion was intended.

Moreover, through the 1982 amendments to the VRA, Congress expanded the remedial power of the Act even further by relieving plaintiffs of the burden of proving discriminatory intent. Overturning a Supreme Court case that held that the original Act contained such a requirement, *see Mobile v. Bolden*, 446 U.S. 55, 61, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), Congress, through the 1982 amendments, made clear that a violation of § 2

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34. *See, e.g.*, Shapiro, *supra*, at 543; Brooks, *supra*, at 858; Hench, *supra*, at 738.

could be established by proof of discriminatory *results*. *See Thornburg*, 478 U.S. at 43-44, 106 S.Ct. 2752 (emphasis added) (reading the 1982 Amendment to the VRA as effectively overturning the *Bolden* requirement of showing purposeful discrimination); S.Rep. No. 97-417, at 27-28, 36-37 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 204-06, 214-15 (noting that the purpose of the Amendments was to repeal *Bolden* and to focus the judicial inquiry only into whether there exists equal access to electoral opportunity). Congress did so because it recognized the difficulty of proving deliberate and purposeful discrimination, and sought to ensure that "in the context of all the circumstances in the jurisdiction in question," any disparate racial impact of facially neutral voting requirements did not result from racial discrimination. S.Rep. No. 97-417 at 27. This "results test" was intended "to serve as a prophylactic against voting practices—such as felon disenfranchisement . . . adopted or retained due to intentional discrimination that would be difficult to prove in court." Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L.Rev. 689, 722 (2006). And its Report accompanying the enactment of the 1982 amendments, the Senate endorsed statements made by the Attorney General during the original VRA hearings that the purpose of "Section 2 w[as][to] ban '*any kind of practice* . . .' if its purpose or effect was to deny or abridge the right to vote on account of race or color." S.Rep. No. 97-417, at 17 (emphasis added). Given this history, it would be wholly incongruous with Congress's broad ameliorative intent to conclude, as does the majority, that where the

particular voter qualification that results in racial discrimination happens to be a felon disenfranchisement law, in this eventuality only, does the VRA provide no relief and permit the discriminatory qualification to persist.

To reach this unlikely result, the majority relies on assorted evidence of the widespread use and general sanction of felon disenfranchisement laws in various contexts. But all that any of this evidence actually shows is that felon disenfranchisement is not presumptively invalid, a proposition as to which, after *Richardson*, 418 U.S. at 56, 94 S.Ct. 2655, there is no doubt. None of the majority's arguments support its conclusion that Congress intended to insulate such laws from scrutiny under § 2 of the VRA where they are alleged to effect a discriminatory result. Specifically, the evidence relied on by the majority includes (1) § 2 of the Fourteenth Amendment, (2) the legislative history of VRA § 4, and (3) Congressional endorsement of felon disenfranchisement generally. I will address each of these sources in turn.

A. Section 2 of the Fourteenth Amendment

The majority suggests that felon disenfranchisement somehow differs from other voting qualifications because the "power of the states to disqualify from voting those convicted of crimes is explicitly set forth in § 2 of the Fourteenth Amendment." But, looking at the text of that provision in context, it is by no means a grant of power to states to disenfranchise

felons. *See* U.S. Const. amend. XIV, § 2. Rather, that provision simply states that disenfranchised felons, unlike other persons disenfranchised by the States, are to be included within the census for purposes of apportioning representatives.[35]

The most that can be gleaned from this language is that by addressing the eventuality of "abridg[ment] . . . for participation in . . . crime," Congress contemplated that at least in *some* circumstances, felon disenfranchisement could exist. Thus, it merely implies that there is no *per se* ban on such laws. But VRA § 2 is targeted at precisely those voting qualifications that are *not* the subject of a per se ban. *See* S.Rep. No. 97-417, at 16 (explaining that under § 2 as amended in 1982, "electoral devices . . . per se would not be subject to attack under section 2. They would only be vulnerable, if, in the totality of circumstances, they resulted in the

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35. In relevant part, that provision states as follows:

> Representatives shall be apportioned among the several States according to their respective numbers, ... But when the right to vote . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. Const. amend. XIV, § 2.

denial of equal access to the electoral process"). As plaintiffs do not allege that felon disenfranchisement laws are unlawful per se, but only as applied in Massachusetts, where they "result in a denial . . . of the right . . . to vote on account of race," 42 U.S.C. § 1973, there is absolutely no conflict between § 2 of the Fourteenth Amendment and allowing plaintiffs to challenge disenfranchisement laws under the VRA.

In other words, that § 2 of the Fourteenth Amendment contemplates disenfranchisement as a potential qualification is unremarkable. As similarly emphasized by the majority, "[t]he criteria for eligibility to vote are defined by the states," and states have the power to fix all kinds of qualifications for voting, disqualifying felons included, but only where the exercise of that power "do[es] not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed." *Lassiter v. Northampton County Bd. Of Elections*, 360 U.S. 45, 50, 79 S.Ct. 985, 3 L.Ed.2d 1072 (1959).[36] However, "[w]hile a State may choose to

36. In fact, the majority's contrary interpretation of § 2 of the Fourteenth Amendment, i.e. that felon disenfranchisement is constitutionally protected and cannot be restricted, would result in a direct conflict between constitutional directives in that it is well-established that a felon disenfranchisement statute *intended* to discriminate against minorities are prohibited under § 1 of the Fourteenth Amendment. *See Hunter v. Underwood*, 471 U.S. 222, 229, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985) (holding Alabama's disenfranchisement for commission of petty crime or misdemeanor provision unconstitutional). The only reading of § 2 that respects the validity of *Hunter* and similar precedent is one that permits states to disenfranchise felons only where federal law does not otherwise preclude them from doing so.

disenfranchise some, all or none of its felons based on legitimate concerns, it may not do so based upon distinctions that have the effect, whether intentional or not, of disenfranchising felons because of their race." *Hayden*, 449 F.3d at 346 (Parker, J., dissenting) (quoting *Baker*, 85 F.3d at 937); *see also Farrakhan*, 338 F.3d at 1016 (noting that although, as a general matter, "states may deprive felons of the right to vote without violating the Fourteenth Amendment, . . . when felon disenfranchisement results in denial of the right to vote . . . on account of race or color, Section 2 affords disenfranchised felons the means to seek redress").

B. Legislative History of VRA § 4

To support its contention that Congress did not intend to include felon disenfranchisement laws within the scope of VRA *§ 2*, the majority also relies on statements in the legislative history of *§ 4*, claiming that *§ 4* "would not result in the proscription of the frequent requirement of States . . . that an applicant for voting . . . be free of conviction of a felony." S.Rep. No. 89-162 (1965), *as reprinted in* 1965 U.S.C.C.A.N. 2508, 2562. This argument is deeply flawed. It is error to assume that a statement about one section of a statute applies to all other sections thereof. *See Hayden*, 449 F.3d at 352-53 (Parker, J., dissenting) (stating that legislative history of one section of an expansive statute such as VRA is "typically of no value" when attempting to understand another, entirely different, section). In fact, the Supreme Court has explicitly warned against doing so in the VRA context. *Hall*, 512 U.S. at 883, 114 S.Ct.

2581 ("To be sure, if the structure and purpose of § 2 mirrored that of § 5, then the case for interpreting §§ 2 and 5 to have the same application in all cases would be convincing. But the two sections differ in structure, purpose, and application."). This is especially true in the case before us given that the two provisions, § 2 and § 4, "differ in structure, purpose, and application." *Id.* Specifically, § 4 is a provision that *categorically* bans, in covered jurisdictions, the use of certain facially neutral tests or devices including literacy tests, educational requirements, and "any requirement that a person as a prerequisite for voting or registration for voting . . . possess good moral character." *See* 42 U.S.C. § 1973b(a)(1)(A), § 1973b(c). In contrast, § 2 applies to "a broader range of practices than those 'tests and devices' defined in Section 4." *Johnson*, 353 F.3d at 1306 n. 27. While § 4 applies only to "covered jurisdictions," and "imposes an outright ban on tests or devices," "§ 2(a), [applies nationally, and] creates a 'results' test, which requires investigating and weighing numerous factors." *Hayden*, 449 F.3d at 353 (Parker, J., dissenting) (internal citation omitted); *see also Nw. Austin*, 557 U.S. __, 129 S.Ct. 2504, 2508 (distinguishing § 2 of the VRA, which "operates *nationwide* . . . [to] forbid[ ] *any* 'standard practice or procedure' that 'results in a denial or the abridgment of the right of any citizen . . . to vote on account of race or color' " from § 4 and the remainder of the VRA which, "[r]ather than continuing to depend on case-by-case litigation . . . directly pre-empted the most powerful tools of black disenfranchisement in the *covered areas*." (emphasis added & internal citations omitted)).

Thus, considering congressional statements about § 4 in the context of the provision at which they were addressed (§ 4), they signify nothing about the scope of what *§ 2* was intended to cover. Given § 4's absolute bar on "good moral character" tests, and the natural susceptibility of "moral character" being read as a proxy for criminal history, the statements upon which the majority relies merely clarify that the categorical bar on "good moral character" tests in § 4 should not be interpreted as also an outright ban on felon disenfranchisement. *See Hayden*, 449 F.3d at 364-65 (Calabresi, J., dissenting) ("[S]uch legislative statements simply make the uncontroversial point that felon disenfranchisement laws are not 'good moral character' requirements within the meaning of § 4(c)."). In contrast, "section 2 addresses voting regulations that are not per se invalid under section 4 but nonetheless result in a racially disparate impact on voting rights." Thomas G. Varnum, *Let's Not Jump to Conclusions: Approaching Felon Disenfranchisement Challenges Under the Voting Rights Act*, 14 Mich. J. Race & L. 109, 136 (2008). Statements regarding § 4 thus provide no indication that Congress intended to insulate felon disenfranchisement laws from scrutiny under § 2 where it is alleged that the operation of a particular law results in the denial of the right to vote on account of race. *See Johnson*, 405 F.3d at 1249 (Barkett, J., dissenting) (noting that decision not to add felon disenfranchisement statutes to list of per se violations does not show intent to exempt these laws from the

VRA); *Hayden*, 449 F.3d at 365 (Calabresi, J., dissenting) ("The fact that race-neutral felon disenfranchisement is permissible under § 4(c) tells us nothing at all about whether § 2 allows *racially discriminatory* felon disenfranchisement." (emphasis in original)).

In support of its argument for applying § 4's legislative history to § 2, the majority suggests that, in light of § 4's limited applicability to "covered jurisdictions" with a history of discrimination, in contrast to § 2's nationwide reach, Congress could not have "permitted" felon disenfranchisement laws in covered jurisdictions, while "prohibiting" them in non-covered jurisdictions like Massachusetts. But this argument similarly misses the mark, precisely because it mischaracterizes the statute. To be sure, the majority's argument would be persuasive if § 2 categorically "prohibit[ted]" felon disenfranchisement laws in Massachusetts and other "non-covered" jurisdictions. But it does not. *See* S.Rep. No. 97-417, at 16. Nor does the VRA "permit" felon disenfranchisement laws, in "covered jurisdictions," or otherwise. Rather, § 2 uniformly imposes a "totality of the circumstances" test to *all* "voting qualifications," *anywhere* in the country, prohibiting them only in the event that they result in racial discrimination. There is nothing illogical about creating a per se ban on certain *presumptively* discriminatory qualifications in "covered jurisdictions" only, as was done in § 4, but also permitting scrutiny of all voting qualifications nationally, including felon disenfranchisement laws, to ensure that no particular qualification is discriminatory as applied under the

particular circumstances. And that is precisely what Congress did through § 2.

By exporting the legislative history of § 4 into the § 2 context, the majority ignores the very plausible interpretation that Congress intended § 2 to include felony disenfranchisement laws precisely *because* it chose to exclude them from § 4's list of categorically barred regulations. While Congress did not seek to have felon disenfranchisement banned in all cases, it nevertheless intended that they be subjected, just like every other voting qualification anywhere in the country, to a "totality of the circumstances" test to assess whether they effectuate a discriminatory *result*. The fact that members of Congress were sufficiently cognizant of felon disenfranchisement laws to carve them out from the scope of § 4, yet made no such statements in regard to § 2, despite the intentionally broad language of that provision, indicates that Congress did not in fact intend a similar restriction in the § 2 context. *See Vidal-Reyes*, 562 F.3d at 53 (*quoting United States v. Councilman*, 418 F.3d 67, 73 (1st Cir.2005)) (" '[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' ").[37]

37. While this rule, known as the *expressio unius est exclusio alterius* canon of construction, *see Councilman*, 418 F.3d at 73-74, is useful for evaluating the import of omissions and inclusions in statutory text, I believe its principle is equally persuasive with respect to express omissions and inclusions in the legislative history of a statute.

Thus, as it stands, the legislative history of § 4 shows that while Congress did not intend to enact a blanket ban on felon disenfranchisement laws as a prohibited "moral character" requirement neither did it intend to exclude discriminatory laws from the scope of VRA scrutiny.

C. Historical Legitimacy and Congressional Endorsement of Felon Disenfranchisement Law

The remainder of the arguments in the majority opinion rely on Congress' sanctioning or presupposing the validity of felon disenfranchisement in various contexts, such as where (1) it has rejected proposals to outright bar felon disenfranchisement, either through the VRA or otherwise, and (2) endorsed disenfranchisement laws generally in the aftermath of the VRA. First of all, "subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment." *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 170 n. 5, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001) (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n. 13, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980)). But more importantly, these arguments are entirely irrelevant to the question before us. Congressional refusal to pass categorical prohibitions on felon disenfranchisement or even its subsequent affirmation of the practice generally, is not inconsistent with Congress's clear intent to subject to scrutiny,

through § 2 of the VRA, "*any* state enactment which altered the election law of a covered State in even a minor way." *Allen*, 393 U.S. at 566-67, 89 S.Ct. 817 (emphasis added). Congress may very well have decided not to bar felon disenfranchisement wholesale (as it did by omitting it from § 4) and may even have endorsed the practice where it was motivated by and served legitimate ends. But it may have nevertheless chosen, in order to make the guarantees of the Fifteenth Amendment meaningful, to restrict the adoption of this "qualification" in those cases where it is applied "in a manner which results" in the denial of the right to vote on account of race. This reading of the legislative history, which is consistent with the statutory text, is far more compelling than the majority's analysis.

Ultimately, "the plainer the language, the more convincing contrary legislative history must be to overcome the natural purport of a statute's language." *United States v. U.S. Steel Corp.*, 482 F.2d 439, 444 (7th Cir.), *cert. denied*, 414 U.S. 909, 94 S.Ct. 229, 38 L.Ed.2d 147 (1973). I see a clear textual mandate, uncontradicted by *any* legislative history, that felon disenfranchisement laws, like all voting qualifications, may be challenged under § 2 of the VRA. "If the language of law is to have any meaning at all, then surely it must prevail over the kind of speculation that is entailed in such an enterprise as th[is] court[ ] ha[s] undertaken." *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1355 (4th Cir.1994).

The plain language of the statute being as clear as it is, and the legislative history and purpose only

bolstering that clarity, I cannot help but speculate that the majority is jumping through hoops to defeat the remedial purpose for which the provision was enacted in order to produce a result consistent with its own preference in policy. But "[t]he Fifteenth Amendment empowers 'Congress,' not the [c]ourt[s], to determine in the first instance what legislation is needed to enforce it." *Nw. Austin*, 557 U.S. __, 129 S.Ct. at *2513. And even if we "question the wisdom of Congress's decision to enact a statute that permits challenging felon disenfranchisement laws, we are judges, not policy-makers." *Hayden*, 449 F.3d at 348 (Parker, J., dissenting). "The duty of a judge is to follow the law, not to question its plain terms." *Id.*, 449 F.3d at 368 (Sotomayor, J., dissenting). "I do not believe that Congress wishes us to disregard the plain language of any statute or to invent exceptions to the statutes it has created." *Id.*

Finally, I see no constitutional issues posed by interpreting the VRA according to its language and consistent with its purpose, so as to encompass felon disenfranchisement laws. Rather, § 2 of the VRA is firmly within the scope of Congress's power to enforce the Reconstruction amendments, which includes the power to "enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 727-28, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003). Finding challenges to felon disenfranchisement laws to be cognizable under the VRA, I have no trouble concluding that the plaintiffs

have stated a claim sufficient to preclude dismissal at this early juncture. Thus, I would affirm the district court's decision on this issue.

II. Ex Post Facto Clause Claim

The second issue raised on appeal, a question of first impression in this circuit, is whether the retroactive application of a felon disenfranchisement provision violates the Ex Post Facto Clause when it is applied to felons incarcerated for crimes committed prior to the provision's passage into law. The Ex Post Facto Clause "bars application of a law 'that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed[.]' " *Johnson v. United States*, 529 U.S. 694, 699, 120 S.Ct. 1795, 146 L.Ed.2d 727 (2000) (quoting *Calder v. Bull*, 3 U.S. 386, 390, 3 Dall. 386, 1 L.Ed. 648 (1798)); *see* U.S. Const. art. 1, § 10 ("No State shall . . . pass any . . . ex post facto Law."). Plaintiffs, incarcerated in Massachusetts for offenses committed prior to Article 120's enactment, contend that Article 120 is unconstitutional as applied to them because it subjects them to additional punishment not provided for by the laws of the Commonwealth when they committed the acts underlying their convictions. The majority affirms the dismissal of plaintiffs' claim on grounds that the deprivation of the right to vote, as accomplished by Article 120, does not constitute "punishment," and thus, falls outside the protections of the Ex Post Facto Clause. I cannot agree. While disenfranchising convicted felons prospectively might be perfectly constitutional, I would hold that the

disenfranchisement provision here is a punitive measure, which cannot be retroactively applied.

"The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact." *Cummings v. Missouri*, 4 Wall. 277, 71 U.S. 277, 320, 18 L.Ed. 356 (1866). As the majority accurately explains, analysis of whether a particular enactment imposes retroactive *punishment* so as to implicate the Ex Post Facto Clause requires a two-part inquiry. The first part asks whether the challenged law has a civil, regulatory purpose, or whether it is intended to punish. *See Smith v. Doe*, 538 U.S. 84, 92, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2002) (*citing Kansas v. Hendricks*, 521 U.S. 346, 361, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997)). If a court finds that the law was intended to be punitive, then it constitutes "punishment" for purposes of the Ex Post Facto Clause and would violate the clause if retroactively applied. *Id.* However, if the law conveys a non-punitive, regulatory purpose, the court moves to the second part of the test to ascertain whether the law is "so punitive either in purpose or effect as to negate [the state's] intention to deem it civil." *Id.* (quoting *United States v. Ward*, 448 U.S. 242, 248-49, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980)). The ultimate question is "whether [Article 120] is intended to be, or by its nature necessarily is, criminal and punitive, or civil and remedial." *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362, 104 S.Ct. 1099, 79 L.Ed.2d 361 (1984).

While legislative purpose is not easily discernible given the unique procedural history of Article 120's enactment by popular referendum, I nevertheless find that a close look at the provision's language and history reveals that it was intended by its proponents to be a primarily punitive measure. Moreover, even if the *primary* intent behind the enactment of Article 120 could not be clearly identified,[38] I would find this disenfranchisement law to be so punitive in effect that it nevertheless constitutes a criminal punishment under the second prong of *Smith*.

A. The Legislative Intent Was Punitive

We first ask whether Article 120 was intended to be a civil or criminal measure. *See Smith*, 538 U.S. at 92, 123 S.Ct. 1140. Determining whether Article 120 was intended to be civil or criminal " 'is first of all a question of statutory construction.' " *Id.* (quoting *Hendricks*, 521 U.S. at 361, 117 S.Ct. 2072). As this court has made clear, analysis of statutory construction "begin[s] with the language of the statute." *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128, 139 (1st Cir.2006) (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450, 122

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38. *See* Gabriel J. Chin, *Are Collateral Sanctions Premised on Conduct or Conviction?*, 30 Fordham Urb. L.J. 1685, 1686 (2003) (opining that "it is not always clear that the primary legislative motivation for a collateral sanction is civil rather than punitive, nor is it always a simple matter to discern the primary motivation").

S.Ct. 941, 151 L.Ed.2d 908 (2002)). Yet, in holding that Article 120 conveys a regulatory intent, the majority again departs from this well-established framework.

The majority disposes of the first prong of *Smith* by citing *Trop v. Dulles* for the proposition that "felon disenfranchisement provisions are considered regulatory rather than punitive." *See* 356 U.S. 86, 94, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958). But leaving aside the merits of this proposition for the moment, the fact that disenfranchisement provisions are *generally* considered regulatory rather than punitive is not dispositive of what the Massachusetts voters and legislators intended here. Rather, the relevant questions are what Article 120's particular language says and if there are any inferences that can be drawn from its broader structure. *See Smith*, 538 U.S. at 92, 123 S.Ct. 1140 (instructing that we should first "consider the statute's text and its structure to determine the legislative objective"). "[C]onsiderable deference must be accorded to the intent as the legislature has stated it." *Id.*

In this case, looking at the text of Article 120, there is no indication on the face of the provision of the legislative intent behind its enactment. Article 120, which was passed pursuant to a ballot question placed before

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39. For an example of the kind of clear language "express[ing] the objective of [a] law in the statutory text itself," *see Smith*, 538 U.S. at 93, 123 S.Ct. 1140 (citing the Alaska Legislature's public safety interest in "protecting the public from sex offenders" as the basis for its sex offender registration provision).

Commonwealth voters, lacks any kind of express "statement of purpose" which legislation often includes, and none of its language reveals a particular government interest in felon disenfranchisement, either regulatory or punitive.[39] Instead, Article 120 merely lays out the substantive voting requirements, including the newly enacted exclusion of incarcerated felons.

Beyond the language of the provision, it is possible that the "broader structure" of the provision may provide some indication of its purpose. *Id.* The majority relies on the placement of Article 120 within the Commonwealth's civil voter qualification provisions, rather than in its criminal code, to infer a regulatory purpose. But while manner of codification is certainly one factor relevant to ascertaining the nature of a provision, the Supreme Court has held that the "location and labels of a statutory provision do not by themselves transform a civil remedy into a criminal one," or vice versa. *Smith*, 538 U.S. at 94, 123 S.Ct. 1140; *see also Trop*, 356 U.S. at 94, 78 S.Ct. 590 ("How simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of the labels pasted on them! Manifestly the issue of whether [a statute] is a penal law cannot be thus determined."). Rather, the Supreme Court instructs that "a penalty [ ] cannot be converted into [a non-penal measure] by so naming it," and we must "ascribe to [the particular statute] the character disclosed by its purpose and operation, regardless of name." *United States v. Constantine*, 296 U.S. 287, 294, 56 S.Ct. 223, 80 L.Ed. 233 (1935) (holding that even though labeled a "tax" on

conducting retail liquor business, challenged statute was nevertheless a "penalty" designed to punish the violation of state liquor laws). Likewise, "even a clear legislative classification of a statute as 'non-penal' would not alter the fundamental nature of a plainly penal statute." *Trop*, 356 U.S. at 95, 78 S.Ct. 590 (holding that a statute stripping army deserters of citizenship is a "penal law" despite its codification amidst the regulatory provisions of the "Nationality Act"); *see also One Assortment of 89 Firearms*, 465 U.S. at 364-65, 104 S.Ct. 1099 (holding a forfeiture provision to be a civil action despite its codification in the state's criminal code). It follows that the Commonwealth's authority to regulate voting requirements as part of its civil power does not, in and of itself, establish that Article 120 was intended as a regulatory measure.

Moreover, any inference of legislative intent that could be drawn from the codification of Article 120 in a civil section of Massachusetts' constitution is undermined by the fact that the Commonwealth was *required* to amend that constitutional provision, which governs voting qualifications generally, in order to disenfranchise felons. In addition, the subject matter of Article 120 is consistent not only with civil voting requirements, but also with criminal rules imposing an additional deprivation upon persons convicted of particular crimes and in the custody of the criminal justice system. In that sense, Article 120's broader structure implies both criminal punishment and civil regulation. In sum, neither the language nor the

structure of Article 120 betrays a clear regulatory or punitive intent.

Without a clear indication of intended purpose from Article 120 itself, we look to legislative history for evidence of legislative intent.[40] *Rolland v. Romney*, 318 F.3d 42, 48 (1st Cir.2003). Here, there are two helpful sources of legislative history-public statements made by Massachusetts' politicians about a series of disenfranchisement proposals that ultimately resulted in Article 120,[41] and the "Information for Voters" Guide ("the Guide") that was distributed to voters at the law's ratification stage.

First, the public statements of proponents of the legislation are quite revealing of the punitive motivation

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40. It is surprising that, given its extensive reliance on statements in the legislative history to analyze the clear statutory language of the VRA, the majority only mentions legislative history briefly in its Ex Post Facto Clause analysis, even though the language and structure of Article 120 is *actually* ambiguous as to whether Article 120 was intended to be punitive or regulatory. While the majority states that it will consider certain comments made by Governor Cellucci, it never analyzes these or other comments by Article 120's proponents relevant to the legislative history of the provision.

41. The legislative process resulting in the passage of Article 120 is worth noting. A constitutional amendment initiated by a legislator must be approved by two successive joint sessions of the Massachusetts legislature and then ratified by Massachusetts voters. Commonwealth Mass. Const. Art. 49, Init., pt. IV, §§ 2-5.

behind Article 120. Writing to the Massachusetts Legislature to propose an earlier version of the instant disenfranchisement law, Governor Cellucci argued that "the time has come to tell would-be criminals in Massachusetts that committing crimes has serious consequences."[42] He advocated for the proposal because it would "ensure that criminals pay their debt to society before they regain their right to participate in the political process." Governor Cellucci also argued in favor of disenfranchising incarcerated felons because "prisons are a place for punishment." Striking a similar tone, State Representative Paul Frost argued that prisoners "don't deserve to vote" and that "this is an issue about justice." Senator Guy Glodis advocated for the law by stating that "philosophically, no inmates deserve the right to vote." These comments, reflecting classic punitive rationales, *see, infra*, section II.B.4 (discussing traditional theories of criminal punishment), provide strong evidence that Article 120 was motivated by an intent to punish felons.

As the majority recognizes, the Guide for voters regarding the ballot question that culminated in the

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42. I agree with the majority that, even though earlier proposals for felon disenfranchisement laws did not pass, their legislative histories are relevant here. These earlier proposals are nearly identical to Article 120, so the motivation for them is relevant evidence for the motivation behind Article 120. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 180, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963) (using the legislative history of earlier legislation when assessing the motivation of a law "quite obviously patterned on that of its predecessor").

enactment of Article 120, is also relevant to deciphering legislative intent. The Guide stated that the proposal would change the law that "allows criminals to continue to exercise control over our lives by voting from prison." The majority found such language to indicate regulatory intent. I disagree. While this language is more ambiguous as to intent than anything else, it suggests to me another retributive statement about what felons "deserve," i.e. to have their right to participate in government revoked. *See id.* The Guide also stated that "[a] yes vote will protect democracy's greatest gift—the right to vote, by reserving it for the law-abiding." I believe this language is further evidence of the punitive principle of "just desert." In any event, the ambiguous indications of intent revealed by the Guide do not outweigh the plainly punitive comments by the measure's proponents.

Confronted with potentially mixed manifestations of legislative purpose—and I believe such a characterization is generous to the Commonwealth's position—this court should decipher the law's "*primary* function." *See Mendoza-Martinez*, 372 U.S. at 169, 83 S.Ct. 554 (emphasis added). Whereas Article 120 itself is unclear as to intent, the Guide is also, at best, ambiguous, and the statements made by Massachusetts politicians are strongly indicative of punitive intent, I find that plaintiffs have made a compelling argument that the weight of the evidence of intent reveals Article 120 to have been intended primarily as a punitive

measure. This punitive measure having been applied to plaintiffs retroactively, I believe that an Ex Post Facto violation could be found without further inquiry. But in an abundance of caution, I will proceed.

B. The Effect of Article 120 Is Punitive

Under the second prong of the *Smith* analysis, even if a clear punitive intent is not discernable for the challenged law, it would nevertheless constitute a criminal punishment subject to the Ex Post Facto Clause if the measure's effect is so punitive as to negate any intent to deem it civil. *Hendricks*, 521 U.S. at 361, 117 S.Ct. 2072 (citing *Ward*, 448 U.S. at 248-49, 100 S.Ct. 2636). The majority correctly explains that, in order to gauge the actual effect of the law, this court reviews the seven factors described in *Mendoza-Martinez:*

> [(1)] Whether the sanction involves an affirmative disability or restraint, [(2)] whether it has historically been regarded as a punishment, [(3)] whether it comes into play only on a finding of scienter, [(4)] whether its operation will promote the traditional aims of punishment-retribution and deterrence, [(5)] whether the behavior to which it applies is already a crime, [(6)] whether an alternative purpose to which it may rationally be connected is assignable for it, and [(7)] whether it appears excessive in relation to the alternative purpose assigned.

See Mendoza-Martinez, 372 U.S. at 168-69, 83 S.Ct. 554 (footnotes omitted). These factors, which are "neither exhaustive nor dispositive," serve as "useful guideposts." *Smith*, 538 U.S. at 97, 123 S.Ct. 1140 (citations omitted).

I agree with the majority that, where the legislature has *clearly stated a civil regulatory intent* in enacting the challenged sanction, " 'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Hudson v. United States*, 522 U.S. 93, 100, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997) (quoting *Ward*, 448 U.S. at 249, 100 S.Ct. 2636). However, I disagree that plaintiffs should be held to that burden, in this case, where the legislative intent is ambiguous at best. The Supreme Court has not resolved this particular question directly. However, where the legislature fails to make its intent clear through express language, or by implication through a law's broader structure, or even through legislative history, there is strong support for the proposition that a challenged law should be subjected to neutral evaluation when determining its effect. *See Mendoza-Martinez*, 372 U.S. at 169, 83 S.Ct. 554 (holding that, "[a]bsent conclusive evidence of congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face"); *Smith*, 538 U.S. at 107, 123 S.Ct. 1140 (Souter, J., concurring) (distinguishing between cases where the legislative intent is clear and those where it is ambiguous, and rejecting the "clearest proof" burden where it is ambiguous). Accordingly, I would

approach the application of the *Mendoza-Martinez* factors, without any starting presumption, to determine whether the actual purpose or effect of Article 120 is punitive. *See Mendoza-Martinez*, 372 U.S. at 168-69, 83 S.Ct. 554. Applying the most relevant of these factors to the inquiry before us, I find that each of them weighs in favor of recognizing Article 120 to be a penal measure subject to the Ex Post Facto Clause.

1. Scienter & Criminality

The third and fifth *Mendoza-Martinez* factors, "whether the challenged sanction comes into place only on a finding of scienter," and relatedly, "whether the behavior to which it applies is already a crime," weigh heavily in favor of concluding that Article 120 is a penal statute. *See id.* at 168, 83 S.Ct. 554. First of all, "the disciplinary sanction here [is] triggered by a criminal conviction which incorporate[s] a finding of criminal intent, and so the disciplinary sanction came into play 'only on a finding of scienter,' " *Porter v. Coughlin*, 421 F.3d 141, 147 (2d Cir.2005) (quoting *Mendoza-Martinez*, 372 U.S. at 168, 83 S.Ct. 554). Similarly, as Article 120 applies only to persons who have already been convicted of a felony, "the behavior to which it applies is [undoubtedly] already a crime," as the fifth *Mendoza-Martinez* factor requires. *Mendoza-Martinez*, 372 U.S. at 168, 83 S.Ct. 554; *see also Dep't of Revenue of*

Montana v. Kurth Ranch, 511 U.S. 767, 781, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994) (noting that fact that a tax on marijuana was "conditioned on the commission of a crime" is " 'significant of [its] penal and prohibitory intent' ").

2. History

The second *Mendoza-Martinez* factor asks whether a particular sanction has "historically been regarded as punishment." *Id.* at 168, 83 S.Ct. 554. There is substantial evidence to this effect. First of all, federal courts have frequently characterized felon disenfranchisement as a punitive measure. In its decision in *Johnson*, the Eleventh Circuit described felon disenfranchisement laws as a "punitive device stemming from criminal law" and explained that "throughout history, criminal disenfranchisement provisions have existed as a punitive device." *See* 405 F.3d at 1228 & n. 5. Similarly, the Second Circuit has noted the "nearly universal use of felon disenfranchisement as a punitive device." *Muntaqim v. Coombe*, 366 F.3d 102, 123 (2d Cir.2004) (vacated en banc on other grounds). "Congress [has also] recognized the punitive nature of felon disenfranchisement laws." *See* Pamela A. Wilkins, *The Mark of Cain: Disenfranchised Felons and the Constitutional No Man's Land*, 56 Syracuse L.Rev. 85, 133-34 (2005) (describing how Congressional acts readmitting former Confederate States to the Union did so on the condition that States prohibited disenfranchisement "except as a punishment for . . . crimes"). This point is reinforced by renowned historian,

Appendix A

Alexander Keyssar's review of voting rights in this country in which he unequivocally characterizes America's felon disenfranchisement laws as an intentionally punitive device. *Id.* (citing Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 316 (2000)). And the ALI's Model Penal Code, a compilation examining the penal law of the United States, labels prisoner disenfranchisement "an integral part of the criminal law." Model Penal Code § 306.3 (Proposed Official Draft 1962). This is strong evidence that, regardless of how a particular disenfranchisement provision is codified, the purpose of disenfranchising felons in American history has been to punish them for their crimes.

There is also substantial evidence, presented by plaintiffs, of the historical use of felon disenfranchisement as a penal mechanism throughout the world. *See Hayden*, 449 F.3d at 315-16 (describing use of "civil death" laws in Medieval continental Europe, "attainder" laws in medieval England, and "infamy" laws in ancient Greece and Rome, all of which revoked political rights, including the right to vote, "as additional punishment for [certain] crimes"); Keyssar, *supra*, at 62-63 ("Disenfranchisement for [infamous] crimes had a long history in English, European, and even Roman law, and it [is] hardly surprising that the principle of attaching civil disabilities to the commission of crimes appeared in American law as well."). Although the district court dismissed this evidence as not relevant to disenfranchisement provisions in *American* history, that approach misreads this factor as used in *Mendoza-*

Martinez. In fact, in *Mendoza-Martinez* itself, the Supreme Court explicitly relied on the history of citizenship deprivation in other countries in determining that the challenged law depriving draft evaders of citizenship was punitive in effect. *See* 372 U.S. at 168 n. 23, 83 S.Ct. 554 (discussing Roman and English societies' use of forfeiting citizenship as a punishment). Thus, evidence of the historical use of felony disenfranchisement laws both in this country and others is relevant, and both reveal the prevalent historic use of such laws as a penal mechanism.

To refute the extensive evidence that disenfranchisement laws have been historically regarded as punitive, the majority cites one court decision that did not concern the disenfranchisement of felons, *Trop*. *See* 356 U.S. at 96-97, 78 S.Ct. 590. *Trop* does contain *dicta* suggesting hypothetically that "the purpose of [a felon disenfranchisement statute] is to designate a reasonable ground of eligibility for voting," *id.*, but as *dicta*, that language is not binding upon us. *See* Wilkins, *supra*, at 102 (arguing that "*Trop's* discussion of disenfranchisement statutes was *dicta* and, therefore, does not excuse judges from the hard work necessary to analyze real disenfranchisement laws"). *Trop* also explains alternatively, that if "[disenfranchisement] were imposed for the purpose of punishing [an offender], the statute[ ] would be penal." 356 U.S. at 96-97, 78 S.Ct. 590. Moreover, that decision says nothing about how such laws have *historically* been regarded. In any event, the problem with relying on *Trop*'s suggestion that felon disenfranchisement could be a "reasonable ground of

eligibility for voting," is that *Trop* fails to reveal what legitimate purpose disenfranchisement serves that would render it a "reasonable ground." This failure to identify why disqualifying felons is a "reasonable ground" is particularly problematic in light of the fact that both cases cited by *Trop* for this proposition, *Davis v. Beason* and *Murphy v. Ramsey*, involve voting qualifications that are no longer regarded as valid.[43] As several scholars argue, *Trop* was decided at a time when the government had virtually unrestricted power to regulate the franchise, prior to the Warren's court's curtailment of that power when it recognized the fundamental nature of voting rights. *See* Wilkins, *supra*, at 102-04; Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate Over Felon*

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43. *See Romer v. Evans*, 517 U.S. 620, 634, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) (holding that the decision of the Court in *Davis v. Beason*, 133 U.S. 333, 10 S.Ct. 299, 33 L.Ed. 637 (1890), which upheld the disenfranchisement of polygamists on grounds that they advocate "practical resistance to the laws of the Territory" and "approve the commission of crimes forbidden by it" is "no longer good law" because "persons advocating a certain practice may [not] be denied the right to vote"). *Murphy v. Ramsey*, 114 U.S. 15, 5 S.Ct. 747, 29 L.Ed. 47 (1885), involved a suit similar to *Davis* in which the Supreme Court upheld a voting qualification disqualifying any "polygamist, bigamist, or any person cohabiting with more than one woman . . ." from voting in Utah. *Id.* at 38, 42-43, 5 S.Ct. 747. Though *Murphy* was not expressly overruled by name, as was *Davis* in *Romer*, it is evident, given the similarity between the *Davis* and *Murphy* challenges, that neither decision continues to represent valid law. The rejection of this line of cases suggests that keeping "undesirable" persons, including felons, from voting is no longer a valid regulatory purpose.

Disenfranchisement, 56 Stan. L.Rev. 1147, 1150-54 (2004). As such, scholars argue that the *dicta* in *Trop* regarding the regulatory nature of felon disenfranchisement laws was premised on an "outdated conception of voting rights," rendering its continued validity questionable. Wilkins, *supra*, at 102-04.

Thus, seeing sparse evidence to the contrary, I am persuaded that the evidence cited by plaintiffs of the historical use of disenfranchisement weighs in favor of deeming the practice to be a punitive device.

3. Affirmative Disability or Restraint

In light of this country's struggle for independence in pursuit of participatory democracy and the centrality attributed to the right to vote in our legal and political culture,[44] I am compelled to conclude that the deprivation of the franchise is an "affirmative disability or restraint" of the gravest sort.

Yet the majority concludes otherwise. In support of its holding that felon disenfranchisement does not constitute criminal punishment, the majority concludes that Article 120 does not impose "any affirmative disability or restraint, physical or otherwise." To the extent the majority suggests that a restraint need be "physical" in order to resemble a punitive sanction, such

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44. *See Werme v. Merrill*, 84 F.3d 479, 482 (1st Cir.1996) ("It is apodictic that the right to vote is a right that helps to preserve all other rights.").

a requirement simply does not exist. Rather, *Smith* discusses physical restraints as only *one* kind of possible restraint a criminal law might impose. *Smith*, 538 U.S. at 100, 123 S.Ct. 1140. In fact, our society regularly punishes wrongdoers without actually imposing physical restraints on them, most commonly, with criminal fines. And Supreme Court decisions tasked with applying the *Mendoza-Martinez* factors to ascertain the penal or regulatory nature of a particular sanction have regularly found *non-physical* sanctions to be affirmative disabilities or restraints. *See*, *e.g.*, *Kurth Ranch*, 511 U.S. at 774, 114 S.Ct. 1937 (holding a tax on illegal drugs to be a punitive measure in part because it "allowed for sanctions by restraint of Debtors' property"). In fact, *Mendoza-Martinez* itself held a non-physical sanction, the deprivation of citizenship, to constitute a sanction "essentially penal in character."

The majority also argues that disenfranchisement during incarceration is not an affirmative disability because it is "not as enduring as permanent occupational debarment." *See Hawker v. New York*, 170 U.S. 189, 18 S.Ct. 573, 42 L.Ed. 1002 (1898) (holding that revocation of medical license does not violate the Ex Post Facto clause). But revoking a license to practice a particular profession is also not the deprivation of a *fundamental right*. In holding the revocation of citizenship rights to be punitive in *Mendoza-Martinez*, the Supreme Court emphasized that it is the "utmost import" and "value" of citizenship rights that renders their deprivation among the gravest of sanctions. *Mendoza-Martinez*, 372 U.S. at 160, 83 S.Ct. 554. Like citizenship itself, the right

to vote, a fundamental component of citizenship, is certainly comparable in its utmost value and importance. *Tashjian v. Republican Party*, 479 U.S. 208, 217, 107 S.Ct. 544, 93 L.Ed.2d 514 (1986) (noting that the right to vote is a fundamental right inherent in citizenship). It is the *importance* of the right to vote that renders the gravity of its deprivation so devastating a "disability." *See Reynolds v. Sims*, 377 U.S. 533, 555, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strikes at the heart of representative government."); *Igartúa-De La Rosa v. United States*, 417 F.3d 145, 177 (1st Cir.2005) (Torruella, J., dissenting) ("There are few countries in the world in which the right to vote is as exalted as it is in the United States."); *McLaughlin v. City of Canton*, 947 F.Supp. 954, 971 (S.D.Miss.1995) (describing disenfranchisement as the harshest sanction imposed by a democratic society and noting that when one is "brought beneath its axe, the disenfranchised is severed from the body politic and condemned to the lowest form of citizenship, where voiceless at the ballot box the disenfranchised, the disinherited must sit idly by while others elect his civic leaders and while others choose the fiscal and governmental policies that will govern him and his family"). Disenfranchisement, though neither physical nor permanent, deprives U.S. citizens of a fundamental right, and as such, is undoubtedly an affirmative disability.

4. Traditional Aims of Punishment

The fourth *Mendoza-Martinez* factor provides that a sanction is more likely punitive if "its operation will promote the traditional aims of punishment-retribution and deterrence." *Mendoza-Martinez*, 372 U.S. at 168, 83 S.Ct. 554; *see also Bell v. Wolfish*, 441 U.S. 520, 539, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) (noting that the Supreme Court has established that "[r]etribution and deterrence are not legitimate *nonpunitive* governmental objectives" (emphasis added)).[45] Of course, the threat of being deprived of a fundamental right will, to a certain extent, always operate to deter a rational person from engaging in unlawful conduct.[46] But as the Supreme Court

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45. *See also* Wilkins, *supra*, at 133 & n. 316 (noting that in his history of American suffrage, Alexander Keyssar characterized felon disenfranchisement laws as intentionally punitive, noting that "disenfranchisement, whether permanent or for an extended period, serves as retribution for committing a crime and as a deterrent to future criminal behavior").

46. That some of Article 120's proponents considered this possibility is evident from statements such as that of Governor Celucci in his letter in support of the disenfranchisement amendment:

> The time has come to tell *would be* criminals in Massachusetts that committing crimes has serious consequences, not only in terms of prison time, but also in terms of the right to participate in deciding how society should be run.

(Emphasis added). This language suggests that the proposal was intended to *deter* "would be" criminals from committing crimes.

has recognized, the deterrent effect of a sanction cannot be wholly dispositive of criminal punishment as all civil penalties have some deterrent effect. *See Kurth Ranch*, 511 U.S. at 777, 114 S.Ct. 1937. It is, however, in its *retributive* nature that felon disenfranchisement truly reveals its punitive colors. *See* Karlan, *supra*, at 1166 (arguing that "disenfranchisement really can be justified only under a retributive theory of criminal punishment"). In this sense, this factor also conclusively weighs in favor of the plaintiffs.

As a form of retribution, " '[p]unishment is the way in which society expresses its denunciation of wrongdoing.' " *Gregg v. Georgia*, 428 U.S. 153, 184 n. 30, 96 S.Ct. 2909, 49 L.Ed.2d 859. The notion is that the offender "owes a debt to society" and "must now atone for his sins by suffering punishment for his transgression." Peter W. Low et. al., Criminal Law 2 (1982). "This . . . conception of punishment . . . makes primary the meting out to a responsible wrongdoer of his just deserts." H.L.A. Hart, *Punishment and Responsibility*, 158-59 (1968). Other scholars have characterized the retributive aim of criminal punishment as predicated upon the notion of restoring the status quo after an offender, by his contravention of the law, has usurped from his victim or from society generally, something to which he is not fairly entitled. *See, e.g.*, Herbert Morris, *Guilt and Innocence*, 33-36 (1976) (characterizing punishment as restoring the fair distribution of benefits and burdens that is displaced when a person violates the rules that others have assumed, thereby gaining an unfair advantage); Jean Hampton, *Retributivism and Its Critics* (1992)

(characterizing retributive punishment as a message that restores the prior status hierarchy between victim and offender which was violated by an offender's degradation of a victim's worth through criminality).

In the context of the retributive purposes of criminal punishment, it becomes apparent how fundamentally intertwined criminal disenfranchisement laws generally, and Article 120 in particular, are with this punitive objective. The statement from Governor Cellucci's letter, referenced *supra*, that the disenfranchisement proposal would "ensure that criminals pay their debt to society" is the textbook articulation of the retributive theory. Similarly, Representative Frost's statement that felons do not "deserve to vote" is fundamentally linked to the retributive notion of "just deserts." And Representative Marini's promise that the law would apply to those who did "despicable things" is consistent with theory of retributive punishment as a means by which society expresses its moral denunciation of unlawful conduct.

Moreover, even the statements contained in the Information for Voters guide, cited by the Commonwealth as evidencing a regulatory non-punitive purpose, in fact, reveal the opposite when considered in the context of criminal punishment theory. For example, the statement that Article 120 would change the law that "allows criminals to continue to exercise control over our lives by voting from prison," is consistent with Morris' and Hampton's notions of retributive punishment as a means of restoring the proper hierarchy between the offender and society,

unfairly tipped in the offender's favor by his desecration of society's rules. By preventing offenders from benefitting further, at society's expense, through their political participation, disenfranchisement helps to restore that lost equilibrium. Finally, felon disenfranchisement laws, by "deny[ing] the civic and human dignity of persons who have been convicted of doing wrong," are emblematic of the denunciatory function of criminal law. *See Bell*, 441 U.S. at 592-93 n. 26, 99 S.Ct. 1861 (Stevens, J., dissenting) (citing letter from Learned Hand to the University of Chicago Law Review).

5. Connection to Non-Punitive Purpose

The sixth *Mendoza-Martinez* factor asks "whether an alternative purpose to which [the challenged sanction] may rationally be connected is assignable for it." 372 U.S. at 168-69, 83 S.Ct. 554.

I note, as a threshold matter and as discussed above, that there was no legitimate non-punitive purpose expressly assigned to Article 120, and that the purpose of the statute as revealed by its legislative history is primarily punitive. But even if we were to speculate as to non-punitive rationales *potentially* assignable to the provision, I simply cannot agree with the majority that there is an "obvious rational *non-punitive* purpose for disenfranchisement." The reality is that "[c]ourts have been hard pressed to define the state interest served by laws disenfranchising persons convicted of crimes." *Dillenburg v. Kramer*, 469 F.2d 1222, 1224-25 (9th

Cir.1972) ("Appellee does not explain why disenfranchisement of those convicted of offenses that can result in confinement in state prison is 'necessary' to vindicate any identified state interest."); *see also Stephens v. Yeomans*, 327 F.Supp. 1182, 1188 (D.N.J.1970) (striking down New Jersey felon disenfranchisement law because court "perceive[d] no rational basis for the . . . classification" of felons as a group that could not vote).

My reading of the legislative history of Article 120, much of which indicates a punitive motivation, and the lack of a sufficient rational nexus to any non-punitive purpose, suggest that any purported regulatory motivations are, in fact, disingenuous. Moreover, the potential non-punitive rationales for felon disenfranchisement are, in many cases, now regarded as illegitimate grounds for restricting the vote, and as such, should not be credited. *See Trop*, 356 U.S. at 96, 78 S.Ct. 590 (holding that a statute is non-penal "if it imposes a disability, not to punish but to accomplish some other *legitimate governmental purpose*." (emphasis added)). That leaves criminal punishment as the only legitimate discernible "legislative aim" behind Article 120. I will consider, in turn, the various non-punitive justifications potentially assignable to Article 120 and explain why each cannot be rationally assignable to it.

First, the majority suggests that the "obvious rational non-punitive purpose for disenfranchisement" is the concern about felons "exercis[ing] control over [people's] lives by voting from prison." But as explained

supra, this concern actually boils down to the punitive sentiment that felons do not "deserve" to do so.

Second, the Commonwealth argues, on appeal, that the purpose of Article 120, evidenced by its placement alongside other valid voter qualifications in the Massachusetts constitution, was to exempt from the franchise those persons "deem[ed] unfit to vote," such as minors, persons under guardianships, and persons convicted of corrupt election practices. That argument rests on the principle that, due to their lack of respect for the criminal law, felons, like minors and mentally incompetent persons, "have raised questions about their ability to vote responsibly," and therefore, "cannot be trusted" to do so. Given the absence of any reference to voter "competence" in the legislative history of Article 120, and the weak connection between disenfranchising incarcerated felons and the alleged interest in responsible voting, I am inclined to dismiss this explanation as a pre-textual rationale masking a punitive purpose. *See Hendricks*, 521 U.S. at 371, 117 S.Ct. 2072 (Kennedy, J., concurring) ("If the object or purpose of the Kansas law had been to provide treatment but the treatment provisions were adopted as a sham or mere pretext, there would have been an indication of the forbidden purpose to punish."). This is because disenfranchising felons is both under and over-inclusive of this alleged rationale. It is under-inclusive because if persons who violate the law have shown that they cannot vote responsibly, then not only incarcerated felons, but all persons who commit any kind of crime should be disenfranchised, whether they are serving a custodial

sentence or not. Moreover, all citizens who for any reason have shown themselves to be irresponsible voters should be disenfranchised as well. It is over-inclusive because some incarcerated felons, despite their prior transgressions, may have, through the rehabilitative elements of their sentence, developed great respect for society's rules. While it is true that "[a] statute is not deemed punitive simply because it lacks a *close or perfect* fit with the non-punitive aims it seeks to advance," *Smith*, 538 U.S. at 102-03, 123 S.Ct. 1140 (emphasis added), the connection here seems especially attenuated, especially in light of the fundamental right that is at stake. This suggests that the concern with felons being "unqualified" is "simply a fictional concern advanced to mask a punitive purpose." *United States v. Brown*, 381 U.S. 437, 446-47, 85 S.Ct. 1707, 14 L.Ed.2d 484 (White, J., dissenting).

More importantly, I question whether the Commonwealth can rely on a felon's purported incapacity to vote responsibly as the "non-punitive rationale" for Article 120 given that neither the ability to vote responsibly nor respect for the existing law remain "reasonable ground[s] of eligibility for voting." *See Trop*, 356 U.S. at 96-97, 78 S.Ct. 590. Rather, the idea that a particular group may be disqualified from voting based on a lack of respect for existing criminal law now constitutes a form of viewpoint discrimination that has been expressly rejected. *See, e.g., Romer*, 517 U.S. at 634, 116 S.Ct. 1620 (*see* parenthetical, *supra*, n. 43); *Dunn v. Blumstein*, 405 U.S. 330, 354-56, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972) (rejecting durational

residency requirements that rested on claims about the desirability of ensuring that citizens understood, and shared, community values before they were permitted to vote); *see also Carrington v. Rash*, 380 U.S. 89, 94, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965) (" 'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible."). Thus, according to one scholar, "contemporary voting rights doctrine casts a serious shadow on the central traditional non-penal justification for felon disenfranchisement: the claim that ex-offenders should not be permitted to vote because they lack the qualities of mind or character voters ought to possess." Karlan, *supra*, at 1152.

Third, a similar analysis applies to the purported non-punitive "regulatory" purpose arbitrarily assigned to Article 120 by the district court. The district court suggested that prisoners are somehow unqualified to participate in the "participatory and collegial process" of "representative democracy" because they "have limited access to information and little opportunity to discuss issues with individuals who are not also being punished for breaking the law." Not only is this "inability-to-become-informed" rationale entirely absent from the discussions motivating the enactment of Article 120, but it is simply not rationally connected with disenfranchising the entire convicted felon population, many of whom may very well have access to newspapers, media, and contact to outside visitors, as well as the leisure time to become politically informed, and thereby, even more knowledgeable voters than law-abiding

persons on the "outside." But again, and more importantly, the Supreme Court has consistently rejected restrictions on the franchise in order to further "knowledgeable or intelligent voting." *See, e.g., Dunn*, 405 U.S. at 356, 92 S.Ct. 995. Thus, "[i]f neither good character nor intelligent use of the ballot nor support for existing criminal laws are generally permissible prerequisites for voting, then it would be perverse to rely on criminal convictions as evidence that individuals lack qualities that voters are not required to have." Karlan, *supra*, at 1155. "The obvious alternative is to conclude that disenfranchisement is indeed punitive and that if it is to be justified, it must be justified as a legitimate form of punishment, rather than as a species of political regulation." *Id.*

Finally, that this "alternative purpose" factor of the *Mendoza-Martinez* analysis weighs in favor of deeming Article 120 a punitive sanction is bolstered by examining what has been found to constitute a "legitimate non-punitive purpose" in prior *Mendoza-Martinez* cases, and what has not. That examination reveals that those cases holding particular sanctions to constitute non-punitive regulatory measures have served far clearer and more substantial societal interests than the attenuated justifications provided for felon disenfranchisement. For example, in *Hendricks*, the state civil commitment law held to be non-punitive was intended to protect the public from dangerous mentally ill persons "likely to engage in 'predatory acts of sexual violence.' " 521 U.S. at 350, 117 S.Ct. 2072. Similarly, Alaska's sexual offender registration requirement, held to be non-punitive in *Smith*, had the express purpose

of "protecting the public from sex offenders" who "pose a high risk of reoffending." 538 U.S. at 93, 123 S.Ct. 1140; *see also United States v. Salerno*, 481 U.S. 739, 747, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) (holding that preventative detention under Bail Reform Act, justified by the need to prevent "danger to the community," was regulatory and preventative, rather than punitive).

On the other hand, the provision being challenged before us bears a far greater resemblance to the one at issue in *Mendoza-Martinez* itself. In *Mendoza-Martinez*, where "there was no reference to the societal good that would be wrought by the legislation," the Supreme Court concluded that "the obvious inference" was that "Congress was concerned solely with inflicting effective retribution upon this class of draft evaders and, no doubt, on others similarly situated." *Mendoza-Martinez*, 372 U.S. at 182, 83 S.Ct. 554; *see also Trop*, 356 U.S. at 97-98, 78 S.Ct. 590 (holding that statute stripping military deserters of citizenship rights cannot rationally be treated other than as a penal law). Finding no legitimate non-penal interest served by the legislation, the Supreme Court in *Mendoza-Martinez* did not go on to speculate as to potential alternative justifications. But even if it had, the conceivable legitimate non-penal justification for stripping an American of his citizenship rights for violating a criminal statute prohibiting the evasion of military service, as in *Mendoza-Martinez* and *Trop*, is no more substantial than the conceivable justifications for stripping a U.S. citizen of an essential component of those rights (i.e. voting), for violating another criminal statute. Of course,

one could argue that by abandoning the obligations of citizenship by evading the military obligations attendant thereto, a person shows that he is not "competent" to exercise the benefits and burdens of citizenship, just like one could argue that a person who breaches the criminal law shows that he is not competent to exercise the responsibility of aiding in its enactment. But the Supreme Court has refused to make this leap, and neither should we here. Given the similarities between the respective sanctions[47]—deprivation of citizenship and deprivation of voting rights—the lack of any clear non-punitive interest for either sanction, and the similar triggering event for the imposition of each, namely, violation of a criminal law, I think we are compelled by *Mendoza-Martinez* to hold Article 120 to be a penal measure. Finding Article 120 to be a penal measure, its constitutionality is subject to the constraints of the Ex Post Facto Clause, and violates that clause as retroactively applied to the plaintiffs.

To be abundantly clear, I see nothing constitutionally impermissible about disenfranchising

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47. *See Nw. Austin*, 557 U.S. at __, 129 S.Ct. *2511 (describing "the right to vote" as "one of the most fundamental rights our citizens"); *Tashjian*, 479 U.S. at 217, 107 S.Ct. 544; *Wolfish*, 441 U.S. at 589-90 & n. 22, 99 S.Ct. 1861 (Stevens, J. dissenting) (noting that "[t]he withdrawal of rights is itself among the most basic punishments that society can exact, for such a withdrawal qualifies the subject's citizenship and violates his dignity" and citing disenfranchisement as the "classic example of the coincidence of punishment and the total deprivation of rights").

felons as a form of criminal punishment. Criminals who are convicted of serious offenses pursuant to a legitimate process are properly deprived by the state of a panoply of fundamental individual and civil rights. But "punishment" must be labeled what it is, and imposed only in compliance with the time-honored constitutional guarantees that legitimate the exercise of that practice. Central among these guarantees is the prohibition against the enactment of ex post facto laws. As Article 120 inflicts a greater punishment upon convicted felons than the law annexed to their crimes when committed, *see Calder v. Bull*, 3 Dall. 386, 390, 1 L.Ed. 648 (1798), I would invalidate its retroactive application. Thus, I would reverse the decision of the district court as to the ex post facto claim, and order that judgment be entered for plaintiffs.

For the reasons herein stated, I respectfully dissent.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS DATED AUGUST 30, 2007

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

C.A. No. 01-11040-MLW

PAUL SIMMONS, *et al.*,

Plaintiffs

v.

WILLIAM F. GALVIN,

Defendant.

MEMORANDUM AND ORDER

WOLF, D.J.

I. INTRODUCTION

Plaintiffs Paul Simmons, Pedro Valentin, and Dennis J. Beldotti seek relief from William Galvin, Secretary of The Commonwealth of Massachusetts, in his official capacity.[1] The plaintiffs complain that, by the passage

1. In another case that has been consolidated for pretrial purposes *pro se* plaintiff Abdur Bashir Nadheerul Islam makes claims that are identical to those asserted by the plaintiffs in this case.

of Amendment CXX to the Massachusetts Constitution, Mass. Const. art. CXX, and Chapter 150 of the Acts of 2001, Mass. St.2001, c. 150, M.G.L. c. 51, § 1, they were wrongfully denied their right to vote in federal and state elections.

Article CXX and Chapter 150 disqualify incarcerated felons from voting in all elections held in the Commonwealth. The plaintiffs, who were convicted prior to these acts, contend that this disenfranchisement violates the Ex Post Facto Clause of the United States Constitution because it imposes an additional penalty for the crimes for which they were previously convicted and sentenced. They also assert that article CXX and Chapter 150 violate the Equal Protection Clause of the Fourteenth Amendment. Finally, they allege that the disenfranchisement of imprisoned felons has a disproportionate effect on African-American and Hispanic-American voters in Massachusetts. They contend that this disparate effect is caused, in part, by a racially discriminatory court system, and operates to deny African-American and Hispanic-American voters the equal right to vote in violation of § 2 of the Voting Rights Act ("VRA"), 42 U.S.C. § 1973(b).

The defendants have moved for summary judgment on the first two claims and for judgment on the pleadings concerning the third. Hearings on the motions were held on April 13 and 18, 2007.

Defendant's motion for summary judgment is being granted. The Ex Post Facto Clause prohibits the

imposition of punishments that were not prescribed at the time a crime was committed. However, article CXX and Chapter 150 were intended to be civil, non-punitive measures for the regulation of the franchise. Therefore, to succeed on their Ex Post Facto claim the plaintiffs must demonstrate by clear proof that the effect of article CXX and Chapter 150 is primarily punitive. They have failed to produce the proof necessary to transform what was manifestly intended to be a civil, regulatory measure into a criminal penalty for the purpose of Ex Post Facto Clause analysis.

In addition, it is well-established that a state may disenfranchise felons without violating the Equal Protection Clause of the Fourteenth Amendment. Only a rational basis is needed to do so. A state may rationally decide that those who have violated the laws are not fit to participate in electing those who make and enforce the law. The Supreme Court has held that disenfranchising felons who have been released from prison does not violate the Equal Protection Clause. It is even more reasonable to disenfranchise felons who are incarcerated.

The defendant's motion for judgment on the pleadings on the plaintiffs' VRA claim recognizes that, because there has been no discovery, a motion for summary judgment would be premature. Contrary to the defendant's contentions, the plaintiffs have stated a claim for which relief may be granted if the facts alleged are proven. More specifically, the VRA is constitutional as applied to felon disenfranchisement

laws. Such laws may violate § 2 of the VRA. The facts alleged in the Second Amended Complaint are sufficient to give the defendant the required notice and state a plausible claim on which relief may be granted if those alleged facts are proven. Therefore, plaintiffs are entitled to discovery on their VRA claim.

II. BACKGROUND

Unless otherwise indicated, the following facts are undisputed.

Article III of the Massachusetts constitution establishes the voting requirements for enumerated state elections. Mass. Const. amend. art. III.[2] This

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2. As amended in 2000, the article provides:

> Every citizen of eighteen years of age and upwards, excepting persons who are incarcerated in a correctional facility due to a felony conviction, and, excepting persons under guardianship and persons temporarily or permanently disqualified by law because of corrupt practices in respect to elections who shall have resided within the town or district in which he may claim a right to vote, six calendar months next preceding any election of governor, lieutenant governor, senators or representatives, shall have a right to vote in such election of governor, lieutenant governor, senators and representatives; and no other person shall be entitled to vote in such election.

Mass. Const. amend. art. III.

provision was amended by the December 6, 2000 enactment of article CXX, which disqualifies incarcerated felons from voting in specified elections. Mass. Const. art. CXX.[3] Subsequently, the Massachusetts legislature enacted Chapter 150, which broadens felon disenfranchisement to include all elections in the Commonwealth. M.G.L. c. 51, § 1.[4]

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3. The article provides:

> Article III of the Amendments to the Constitution, as amended, is hereby further amended by inserting after the word "upwards" the following words:—", excepting persons who are incarcerated in a correctional facility due to felony conviction, and."

Mass. Const. Art. CXX.

4. The statute, as amended, states:

> Every citizen eighteen years of age or older, not being a person under guardianship or incarcerated in a correctional facility due to a felony conviction, and not being temporarily or permanently disqualified by law because of corrupt practices in respect to elections, who is a resident in the city or town where he claims the right to vote at the time he registers, and who has complied with the requirements of this chapter, may have his name entered on the list of voters in such city or town, and may vote therein in any such election, or except insofar as restricted in any town in which a representative town meeting form of government has been established, in any meeting held for the transaction of town affairs. Notwithstanding any special law to the contrary, every such citizen who

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By law, a constitutional amendment initiated by a legislator must be approved by two successive joint sessions of the Massachusetts legislature and then ratified by the voters of the Commonwealth. Mass. Const. art. 49, Init., pt. IV, §§ 2-5. Between 1988 and 1997, several state legislators attempted unsuccessfully to invoke this process to enact some form of felon disenfranchisement. *See, e.g.*, H. 5468, 1988(Ma.). In 1997, Representative Francis Mariani introduced a felon disenfranchisement bill which failed in committee. However, it did not die.

Within a few months of the committee vote, *The Boston Globe* reported that Massachusetts prisoners were planning to form their own political action committee. *See* Zachary R. Dowdy, Prisoners Forming Mass. PAC, *The Boston Globe*, August 2, 1997, *available at* 1997 WLNR 2363144. Governor Paul Cellucci reacted promptly, stating: "When you sentence someone to prison, they lose their liberties for a reason[.] * * *

(Cont'd)

> resides within the boundaries of any district, as defined in section one A of chapter forty-one, may vote for district officers and in any district meeting thereof, and no other person may so vote. No person otherwise qualified to vote for national or state officers shall, by reason of a change of residence within the commonwealth, be disqualified from voting for such officers in the city or town from which he has removed his residence until the expiration of six months from such removal.

M.G.L. c. 51, § 1.

Prison is suppose to mean punishment, not some opportunity to form a political group." Richard Chacon, Cellucci Plans Ban On Inmates' Voting, *The Boston Globe,* August 3, 1997, *available at* 1997 WLNR 2364658.

The Governor then proposed a constitutional amendment that would disenfranchise all incarcerated individuals, whether felons or misdemeanants. *See* Letter from Argeo Paul Cellucci, Governor, Massachusetts, to Massachusetts Senate and House of Representatives (August 12, 1997). In support of his amendment, the Governor stated that:

> The time has come to tell would-be criminals in Massachusetts that committing crimes has serious consequences, not only in terms of prison time, but also in terms of the right to participate in deciding how society should be run.
>
> Criminals behind bars have no business deciding who should govern the law-abiding citizens of the Commonwealth. This proposed amendment will ensure that criminals pay their debt to society before they regain their right to participate in the political process.

Id.

While the legislature did not vote on the Governor's proposed amendment, it incorporated its text into the

bill previously rejected by committee. With one alteration—the legislature struck the misdemeanant provision—the amendment was approved by both the 1998 and 2000 joint sessions of the legislature.

The law required that the proposed constitutional amendment then be presented to the voters. Mass. Const. art. 49, Init., pt. IV, §§ 2-5. The Secretary of State distributed an Information for Voters guide, which stated in reference to article CXX:

> When someone in Massachusetts is sentenced to jail for committing a felony, we deprive them of their liberty and right to exercise control over their own lives, yet current law allows these same criminals to continue to exercise control over our lives by voting from prison. This amendment will change th [at] law[.]

2000 Information for Voters.

This statement was written by Representative Marini, who sponsored the 1997, failed amendment. It echoed the rationale he presented at the 1998 and 2000 Constitutional Convention. *See* July 29, 1998 Tr. of Constitutional Convention at 28; Feb. 28, 2000 Tr. of Constitutional Convention at 7-8. One other legislator expressed a similar view. *See* July 29, 1998 Tr. of Constitutional Convention at 23.

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During the constitutional debate, other legislators made relevant remarks. Representative Paul Frost opined that "people who've committed murder and other heinous crimes * * * don't deserve to vote." July 29, 1998 Tr. of Constitutional Convention at 18. He added, "[t]his is an issue about justice." Feb. 28, 2000 Tr. of Constitutional Convention at 17. Senator Guy Glodis argued that "philosophically, no inmates deserve the right to vote." Feb. 28, 2000 Tr. of Constitutional Convention at 17.

The voters ratified article CXX in 2000. Article CXX took effect on December 6, 2000. In 2001, the legislature enacted Chapter 150.

In their Second Amended Complaint, the plaintiffs allege: (1) that article CXX has "a disproportionately adverse effect on the voting rights of African-American and Hispanic-Americans," ¶¶ 51, 52; (2) that such disproportionate effect "is caused by, among other things, the facts that African-American and Hispanic-Americans are over-represented in the population of Massachusetts incarcerated felons," *id.;* (3) "that there exists considerable racial and ethnic bias, both direct and subtle, in the Massachusetts court system," *id.;* (4) that there is a causal link between the overrepresentation of minorities in the incarcerated felon population and the racial and ethnic bias in the Massachusetts court system, *id.;* and (5) that lawmakers were aware of the possibility of bias in the Massachusetts court system prior to the passage of article CXX because of, among other things, the

publication of the 1994 Final Report of the Massachusetts Commission to Study Racial and Ethnic Bias in the Courts, *id.* at ¶¶ 21-22.

The parties stipulated, and the court agreed, that a class action is unnecessary in this matter because the defendant will, in the event of judgment for the plaintiffs, restore voting rights to all persons who would have benefitted by a ruling in a class action. *See* Jan. 29, 2003 Order.

In addition, since the issues are identical, it is only necessary to analyze the questions presented concerning article CXX. The analysis is equally applicable to Chapter 150.

III. ANALYSIS

A. *Ex Post Facto Clause*

The plaintiffs contend that article CXX violates the Ex Post Facto Clause because it imposes an additional penalty—disenfranchisement—for the crimes which they committed before enactment of the constitutional amendment. The Ex Post Facto Clause states that, "No State shall . . . pass any . . . ex post facto Law." U.S. Const. art. 1, § 10. It "bars application of a law 'that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed[.]' " *Johnson v. United States*, 529 U.S. 649, 699 (2000) (*quoting Calder v. Bull*, 3 U.S. 386, 390, 3 Dall. 386, 1 L.Ed. 648 (1798)).

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Under the Ex Post Facto Clause, the court must engage in a two-step analysis of a challenged law. First, it examines the act to determine whether the legislature intended it to be punitive. *See Smith v. Doe*, 538 U.S. 84, 92, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2002) (*citing Kansas v. Hendricks*, 521 U.S. 346, 361, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997)). Where the court finds such intent, the inquiry is at an end. *Id.* However, where the act evinces a legislative intent to establish a civil, nonpunitive, regulatory scheme, the court must ensure that the scheme is not "so punitive either in purpose or effect as to negate [the state's] intention to deem it civil." *Id.* (internal quotation marks and citations omitted). "Because [a court] ordinarily defers to the legislature's stated intent, only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Id.* (internal quotation marks and citations omitted).

"Whether a statutory scheme is civil or criminal 'is first of all a question of statutory construction.' " *Smith*, 538 U.S. at 92 (*quoting Hendricks*, 521 U.S. at 361). In construing a statute, a court must "consider the statute's text and its structure to determine the legislative objective." *Id.* "[I]n all statutory construction cases, [the court must] begin with the language of the statute.' " *Philips v. Pembroke Real Estate, Inc.*, 459 F.3d 128, 139 (1st Cir.2006) (*quoting Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002)). Statutory language is accorded "its ordinary meaning by reference to the specific context in which the language is used, and the broader context of the statute

as a whole. If the statutory language provides a clear answer, the inquiry ends." *United States v. Roberson*, 459 F.3d 39, 51 (1st Cir.2006) (internal quotation marks and citations omitted). "[T]he congressional intendment conveyed by unclear statutory language may be discernible from its legislative history." *Rolland v. Romney*, 318 F.3d 42, 48 (1st Cir.2003) (internal quotation marks and citations omitted). The task of construing a statute involves reaching a conclusion of law rather than making a finding of fact. *See United States v. Jones*, 10 F.3d 901, 904 (1st Cir.1993).

As explained below, article CXX manifests the legislature's intent to enact a civil, nonpunitive, regulatory requirement, and there is not the clear proof necessary for the court to override the legislature's intent and treat the provision as a criminal penalty. Therefore, the defendant is entitled to summary judgment on plaintiffs' Ex Post Facto Clause claim.

The legislature, through the text and structure of article CXX, expressed an intent to enact civil requirements for voting. Article CXX amended article III of the Massachusetts constitution. Article III states the Commonwealth's voting requirements and makes no reference to penal purposes. Regulations concerning eligibility to vote are within the civil powers of the states. The Supreme Court has written that previous criminal record is an "obvious" factor that "a State may take into consideration in determining the qualifications of voters." *Lassiter v. North Hampton County Bd. of Elections*, 360 U.S. 45, 51, 79 S.Ct. 985, 3 L.Ed.2d 1072

(1959). The plaintiffs contend that little weight should be given to the placement of article CXX in a civil section of the Massachusetts constitution because the legislature was required to amend Article III to enact a felon disenfranchisement law. However, as in *Smith* and *Hendricks*, " 'nothing on the face of the [amendment] suggests that the legislature sought to create anything other than a civil . . . scheme[.]' " *Smith*, 538 U.S. at 93 (*quoting Hendricks*, 501 U.S. at 361).

Moreover, the legislative history of article CXX does not persuade the court that it should be construed as creating a criminal penalty. The Supreme Court has "recognized [ ] any statute decreeing some adversity as a consequence of certain conduct may have both a penal and nonpenal effect." *Trop v. Dulles*, 356 U.S. 86, 96, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958). At best, the statements prior to the legislature's approval of the amendment reflect the potential hybrid nature of any felon disenfranchisement law. For example, Governor Cellucci's statements quoted earlier include "prison is supposed to mean punishment," which suggests a punitive purpose, and "[c]riminals behind bars have no business deciding who should govern the law-abiding citizens of the Commonwealth," which is a classic statement of the recognized civil, regulatory purpose of felon disenfranchisement laws. *See Trop*, 356 U.S. at 96-7; *Green v. Bd. of Elections of the City of New York*, 380 F.2d 445, 449-50 (2d Cir.1967).

The Information for Voters guide explained that the proposed constitutional amendment would change the

law that "allows [ ] criminals to continue to exercise control over our lives by voting from prison." This expresses a civil, regulatory purpose. *Id.* There is no language in the guide that indicates that the proposed amendment had a punitive purpose. As the constitutional amendment required voter ratification, that guide is particularly meaningful legislative history. It does not contradict the conclusion concerning statutory intent that the court discerns from the express language of the amendment when viewed in the context in which it is used. Therefore, the court concludes that the amendment was intended to be primarily civil and regulatory, rather than punitive, in nature.[5]

Judge Rya Zobel of this District Court reached the same conclusion in addressing Chapter 150, the statutory provision at issue in the instant case. As she wrote:

> The statute, as a whole, makes clear that the legislature exercised its broad mandate to regulate voting qualifications and not to punish anyone. Persons under guardianship, persons disqualified because of corrupt elections practices, and all persons under 18 years of age are included among those disenfranchised, in addition to incarcerated felons. All of these excluded persons implicate

5. Even if the legislative history is viewed as conflicting, "legislative history that itself is inconclusive will rarely, if ever, overcome the words of a statute." *Rhode Island v. Narragansett Indian Tribe,* 19 F.3d 685, 698 (1st Cir.1994).

> rational choices: persons under guardianship are in some manner disabled from making choices implicit in voting; persons who have corrupted the election process have shown their contempt therefor and their disregard of the imperative that it be honest and accurate; and incarcerated felons are disqualified during the period of their imprisonment when election officials may have difficulty identifying their address and ensuring the accuracy of the ballot.

King v. Boston, No. 05-10156, 2004 WL 1070573 (D.Mass. May 13, 2004), at *1.

As article CXX is regulatory on its face, the court must next determine whether its actual purpose or effect is to impose punishment. *See Smith*, 538 U.S. at 92. As described earlier, where the legislature has indicated a preference for one label over another, the plaintiff must provide "the clearest proof [to] override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Id.* at 92 (internal quotation marks and citation omitted).

To determine the actual effect of article CXX, the court must analyze the seven factors described in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963). *See Smith*, 538 U.S. at 97. As the *Mendoza-Martinez* factors are designed for various constitutional contexts, they are "neither exhaustive nor dispositive[;]" rather, they are "useful

guideposts." *Id.* The *Mendoza-Martinez* factors most relevant to this case "are whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose." *Id.*

In *Smith*, the Supreme Court reviewed a grant of summary judgment for the state. *Id.* at 91. It applied these factors and found Alaska's sex offender registry not to be penal for the purposes of the Ex Post Facto Clause analysis. *Id.* at 97-105. It reasoned first that there was no connection between the registration requirement and sanctions that had historically been regarded in the United States as punitive. *Id.* at 97. In the instant case, the plaintiffs also fail to establish that disenfranchisement has been traditionally understood in our country to be punishment.

In *Trop*, the Supreme Court used felon disenfranchisement laws as the example of statutes that are traditionally regarded as primarily civil despite the fact that they may also have a penal effect. It explained:

> In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc., it has been

> considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose. The Court has recognized that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and a nonpenal effect. The controlling nature of such statutes normally depends on the evident purpose of the legislature. The point may be illustrated by the situation of an ordinary felon. A person who commits a bank robbery, for instance, loses his right to liberty and often his right to vote. If, in the exercise of the power to protect banks, both sanctions were imposed for the purpose of punishing bank robbers, the statutes authorizing both disabilities would be penal. But because the purpose of the latter statute is to designate a reasonable ground of eligibility for voting, this law is sustained as a nonpenal exercise of the power to regulate the franchise.

Trop, 356 U.S. at 95-96; *see also id.* at 124; (Frankfurter, J., dissenting) ("loss of civil rights as a result of conviction for a felony" is not a "'punishment' for any legally significant purpose." (*citing* James A. Gathings, *Loss of Citizenship and Civil Rights for Conviction of Crime*, 43 Am. Pol. Sci. Rev. 1228, 1233 (1949))). In finding that a felon disenfranchisement law was not punitive and, therefore, not an unconstitutional bill of attainder, the Second Circuit noted that, in *Trop*, "the Chief Justice

used statutes depriving felons of voting rights to illustrate what was not a penal law." *Green*, 380 F.2d at 449.

To support their argument that felon disenfranchisement laws have been traditionally regarded as punitive, the plaintiffs rely on an article by Professor Mirjan R. Damaska, *Adverse Legal Consequence of Conviction and their Removal: A Comparative Study*, 59 J.Crim. L. Criminology & Police Sci. 347, 351 (1968). Professor Damaska writes that felon disenfranchisement laws have historically been regarded as punitive in many countries other than the United States. *Id.* at 352-54. Relying on this article, the Second Circuit, sitting *en banc*, wrote that the imposition of disenfranchisement as a criminal penalty extends back to ancient Athens and through the Roman Republic, Medieval England, Nineteenth Century Continental Europe, Colonial America, and the Early American Republic. *See Hayden v. Pataki*, 449 F.3d 305, 316 (2d Cir.2006). Similarly, the Eleventh Circuit, sitting *en banc*, noted that "throughout history, criminal disenfranchisement provisions have existed as a punitive device" and that such provisions "are punitive devices stemming from criminal law." *Johnson v. Bush*, 405 F.3d 1214, 1218 n. 5, 1228 (11th Cir.2005) (*citing Recent Developments: One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 Harv. L.Rev.1939, 1939-42 (2002)).

However, Professor Damaska's article does not discuss the experience in the United States. Therefore,

it does not address whether felon disenfranchisement "has been regarded in *our* history and traditions as a punishment." *Smith*, 538 U.S. at 97 (emphasis added). Moreover, the quoted statements by the Second and Eleventh Circuit in *Hayden* and *Johnson* are dicta. Neither *Hayden* nor *Johnson* required resolution of the question of whether a felon disenfranchisement law was penal or regulatory. Rather, *Hayden* and *Johnson* were VRA cases and the historical references to the disenfranchisement of felons were only relevant to whether Congress intended to subject felon disenfranchisement to the requirements of the VRA given its long history. *See Hayden*, 449 F.3d at 316; *Johnson*, 405 F.3d at 1218.

Most significantly, as described earlier, in 1968 the Supreme Court characterized felon disenfranchisement laws as traditional civil regulations of the right to vote. *See Trop*, 365 U.S. at 96-97. There is no evidence of any material change in this traditional view since 1968. Therefore, this court is guided by the dicta in *Trop* and concludes that in the United States felon disenfranchisement laws have traditionally been regarded as civil, regulatory measures rather than as punitive.

With regard to the second *Mendoza-Martinez* factor, like the sex offender registration requirement at issue in *Smith*, felon disenfranchisement "imposes no physical restraint, and so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint." *Smith*, 538 U.S. at 99-100.

Moreover, there is no evidence that felon disenfranchisement is connected materially to other traditional aims of punishment such as deterrence and retribution. While disenfranchisement might have some deterrent effect, "[a] ny number of governmental programs might deter crime without imposing punishment." *Id.* at 102. " 'To hold that the mere presence of a deterrent purpose renders such government's ability to engage in effective regulation.' " *Id. (quoting Hudson,* 522 U.S. at 105).

There is also no indication that the disenfranchisement of incarcerated felons has the purpose or material effect of serving the criminal law's goal of satisfying the need for retribution. "Retribution is: 'one of the purposes of punishment, [ ] satisfying the instinct of retaliation and revenge, which naturally arises in a victim, but also to a considerable extent in society generally. It may be deemed controlled and regularized vengeance exacted by society.' " *United States v. Sampson,* 300 F.Supp.2d 275, 277-278 (D.Mass.2004) (*quoting* David M. Walker, *The Oxford Companion to Law* 1068 (1980)). Just as any governmental program might deter crime without imposing punishment, *Smith,* 539 U.S. at 102, any marginal retributive effect of felon disenfranchisement does not render it, or contribute to rendering it, punishment.

The Supreme Court deems the relationship of a law to legitimate regulatory purposes the " 'most significant' factor in [its] determination that the statute's effects

are not punitive." *Smith*, 538 U.S. at 102. Here, disqualifying those who are imprisoned from voting is rational. As explained by Judge Henry Friendly:

> A man who breaks the laws he has authorized his agent to make for his own governance could fairly [be] thought to have abandoned the right to participate in further administering the compact. On a less theoretical plane, it can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases.

Green, 380 F.2d at 451 (footnote omitted).

Indeed, there is a particularly strong regulatory reason to exclude incarcerated felons from voting. Democracy is a participatory and collegial process. Although we have a representative democracy, we continue to honor the ideal of ancient Athens, which as Pericles described it:

> differ[ed] from other states in regarding the man who holds aloof from public life not as "quiet" but as "useless;" we decide or debate, carefully and in person, all matters of policy, holding, not that words and deeds go ill

> together, but that acts are foredoomed to failure where undertaken undiscussed.

Alfred Zimmern, *The Greek Commonwealth* 206 (1956). Prisoners have limited access to information and little opportunity to discuss issues with individuals who are not also being punished for breaking the law. Therefore, it is rational and reasonable to exclude prisoners from voting.

Finally, the regulatory scheme at issue here necessarily applies only to past, criminal conduct. As such, the two "remaining *Mendoza-Martinez* factors—whether the regulation comes into play only on a finding of scienter and whether the behavior to which it applies is already a crime—are of little weight in this case." *Smith*, 538 U.S. at 105.

In summary, in *Smith*, 528 U.S. at 92, the Supreme Court stated the precise test to be applied to Ex Post Facto Clause challenges to laws which prohibit felons from voting. Where, as here, the manifest intention of the provision at issue is to establish a civil, regulatory scheme and there is not clear proof that the effect of that scheme is punitive, that law cannot be deemed punitive. *Id.* As article CXX is not punitive, it is not subject to the prohibition of the Ex Post Facto Clause.

B. *The Equal Protection Clause*

Plaintiffs also argue that article CXX violates the Equal Protection Clause of the Fourteenth Amendment

because it makes an irrational distinction between incarcerated felons on the one hand and incarcerated misdemeanants, felons who have served their sentence, and the general population on the other. The defendant is entitled to summary judgment on this claim as well.

In *Richardson v. Ramirez*, 418 U.S. 24, 54, 94 S.Ct. 2655, 41 L.Ed.2d 551 (1974), the Supreme Court held that because felon disenfranchisement is specifically referenced in § 2 of the Fourteenth Amendment, laws disqualifying felons who have served their sentence are not subject to strict scrutiny. Therefore, laws disenfranchising felons do not violate the Equal Protection Clause of the Fourteenth Amendment if there is a rational basis for them. *See Owens-Barnes*, 711 F.2d 25, 27 (3rd Cir.1983); *Shepard v. Trevino*, 575 F.2d 1110, 1114 (5th Cir .1978). Rational basis review requires only that government action correlate to a legitimate governmental interest. *See PF2 Props., Inc. v. Rodriguez*, 928 F.2d 28, 31-32 (1st Cir.1991).

Once again, "it can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce them, the prosecutors who try them for further violations, or the judges who are to consider their cases." *Green*, 380 F.2d at 451. In *Richardson* the Supreme Court held that prohibiting felons who had been released from prison from voting did not violate the Equal Protection Clause of the Fourteenth Amendment. 418 U.S. at 56. It is even more reasonable to disenfranchise felons who are

imprisoned and, therefore, are not deemed to have been rehabilitated and are not able to participate fully in the collegial process of preparing to vote. It is also rational to disqualify imprisoned felons from voting, while allowing incarcerated individuals who have committed only misdemeanors—which are less serious offenses—to retain the franchise. Therefore, article CXX does not violate plaintiffs' rights to Equal Protection.

C. *The Voting Rights Act*

The defendant has moved for judgment on the pleadings on plaintiffs' claim that article CXX violates the VRA. There are several bases for this contention. First, the defendant asserts that the constitution exempts felon disenfranchisement from the wide range of schemes that can be prohibited by statute if they are racially discriminatory unless they were motivated by a discriminatory intent. Second, he contends that the VRA is not intended to cover felon disenfranchisement laws. Third, the defendant argues that if the VRA is intended to include such laws it is unconstitutional because Congress did not make the necessary findings that felon disenfranchisement is often a pretext for racial discrimination. Finally, the defendant claims that even if the VRA permissibly prohibits felon disenfranchisement laws in certain circumstances, the Second Amended Complaint in this case fails to state a claim on which relief may be granted.

The issues presented concerning the VRA have divided the circuits that have addressed them, two on

motions for summary judgment and the third on a motion for judgment on the pleadings. *Compare Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir.2003) (reversing a grant of summary judgment for the state and finding VRA's plain text prohibits racially discriminatory felon disenfranchisement laws), *with Johnson*, 405 F.3d at 1217 (addressing a motion for summary judgment and finding VRA does not cover felon disenfranchisement laws), *and Hayden*, 449 F.3d at 309 (addressing a motion for judgment on the pleadings and finding that the VRA does not cover felon disenfranchisement laws). As explained below, this court agrees with the Ninth Circuit and the four dissenters in the Second Circuit that felon disenfranchisement laws are covered by the VRA and that the VRA is constitutional as applied to them. This court also finds that the allegations of the Second Amended Complaint are sufficient to state a VRA claim on which relief can be granted.

Defendant's constitutional and statutory arguments rely heavily on the reference to felon disenfranchisement in the Fourteenth Amendment. Section 2 of the Fourteenth Amendment provides, in part, that when a state denies right to vote to any citizen for participation in a "crime, the basis of representation [of that state in Congress] shall be reduced by that portion which the number of such [ ] citizens shall bear to the whole number of [ ] citizens . . . in such State." Focusing on this provision, the Eleventh Circuit stated:

> As the Court explained in *Richardson*, "the exclusion of felons from the vote has an affirmative sanction in section 2 of the Fourteenth Amendment, a sanction which was not present in the case of the restrictions on the franchise which were invalidated [in other cases]." 418 U.S. at 54. Thus, interpreting Section 2 of the Voting Rights Act to deny Florida the discretion to disenfranchise felons raises serious constitutional problems because such an interpretation allows a congressional statute to override the text of the Constitution.
>
> It is a long-standing role of statutory interpretation that federal courts should not construe a statute to create a constitutional question unless there is a clear statement from Congress endorsing this understanding.

Johnson, 405 F.3d at 1128-29.

The defendant here makes a similar argument. He recognizes that after *Richardson*, in a case alleging violation of 42 U.S.C. § 1983, the Supreme Court held that "[VRA] § 2 was not designed to permit the purposeful racial discrimination attending the enactment and operation of [an Alabama felon disenfranchisement law] which otherwise violates § 1 of the Fourteenth Amendment." *Hunter v. Underwood*, 471 U.S. 222, 233, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985); *see also Hayden*, 449 F.3d at 349 (Parker, J., dissenting).

Therefore, the defendant asserts that "although the Fourteenth and Fifteenth Amendments restricted the power of States to limit who is eligible to vote, they reserved to the States the power to disenfranchise felons so long as the disenfranchisement law was not adopted with racially discriminatory intent." Def.'s Mem. In Supp. of Mot. for J. at 28. Thus, defendant argues that if the VRA was intended to reach more than felon disenfranchisement laws enacted with discriminatory intent it would be unconstitutional and, therefore, the statute should not be construed to do so.

This contention, however, is not meritorious, essentially because it overlooks the Fifteenth Amendment. The Fifteenth Amendment directly addresses voting. It provides in § 1 that the right of "citizens . . . to vote shall not be denied or abridged by . . . any State on account of race. . . ." Section 2 provides that "[t]he Congress shall have power to enforce this article by appropriate legislation."

As explained by Judge Barrington Parker in his dissent in *Hayden:* "Congress's enforcement powers under the Fourteenth and Fifteenth Amendment overlap in certain areas. Nevertheless, the Fifteenth Amendment provides a separate, distinct source of congressional power to regulate racially discriminatory voting restrictions." 449 F.3d at 350. "[T]he Fifteenth Amendment was enacted, among other reasons, precisely because the Fourteenth Amendment—including § 2—did not prohibit states from disenfranchising Blacks." *Id.* at 352. The VRA was

enacted, in part, pursuant to Congress' power under the Fifteenth Amendment. *See Chisom v. Roemer*, 501 U.S. 380, 383, 111 S.Ct. 2354, 115 L.Ed.2d 348 (1991); *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966); *Hayden*, 449 F.3d at 349 (Parker, J., dissenting).

As § 2 of the Fourteenth Amendment does not alter the Fifteenth Amendment, it does not preclude Congress from prohibiting racially discriminatory felon disenfranchisement pursuant to the Fifteenth Amendment Enforcement Clause. *See Hayden*, 449 F.3d at 350 (Parker, J., dissenting); *Johnson*, 405 F.3d at 1240-41 (Wilson, J., dissenting); *id.* at 1248 (Barkett, J., dissenting); *see also Farrakhan*, 338 F.3d at 1016 (Section 2 of the Fourteenth Amendment does not preclude Congress from remedying racially discriminatory felon disenfranchisement pursuant to Fourteenth Amendment).

Therefore, this court does not find that § 2 of the Fourteenth Amendment would render the VRA unconstitutional if it covers felon disenfranchisement laws that were not enacted with discriminatory intent. This court also respectfully disagrees with the Eleventh Circuit and finds that § 2 of the Fourteenth Amendment does not " 'raise the serious constitutional problems' " which require the court to " 'construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.' " *Johnson*, 405 F.3d at 1229 (*quoting DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 99

L.Ed.2d 645 (1988)). Accordingly, the court must interpret the VRA in the conventional manner, by considering the language of the statute in the context in which it is used. *See Roberson*, 459 F.3d at 51.

The VRA states, in pertinent part:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section

> establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973(a).

The current text of § 2 resulted from a 1982 amendment to the VRA.

> The amendment was largely a response to [the Supreme] Court's plurality opinion in *Mobile v. Bolden*, 446 U.S. 55 (1980), which had declared a violation either of § 2 response to [the Supreme] that, in order to establish or of the Fourteenth or Fifteenth Amendments, minority voters must prove that a contested electoral mechanism was intentionally adopted or maintained by state officials for a discriminatory purpose. Congress substantially revised § 2 to make clear that a violation could be proved by showing discriminatory effect alone and to establish as the relevant legal standard the "results test," applied by the Court in *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), and by other federal courts before *Bolden*, *supra*. S.Rep. No. 97-417, 97th Cong. 2nd Sess. 28 (1982), U.S.Code Cong. & Admin. News 1982, pp. 177, 205.

Thornburg v. Gingles, 478 U.S. 30, 35, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986); *Hayden*, 449 F.3d at 348 (Parker, J., dissenting). Therefore, § 2(a) expressly covers all

voting qualifications without any stated (or suggested) exemption for felon disenfranchisement laws; provides that, at least in certain circumstances, a voting qualification with a discriminatory effect will violate the statute; and establishes a particular "results test" for determining if a violation has occurred.

The unqualified prohibition established by § 2(a) is intentionally broad. In § 2 Congress sought "to give the Act the broadest possible scope" in order to cover various practices that "might effectively be employed to deny citizens their right to vote." *Allen v. State Bd. Of Elections*, 393 U.S. 544, 566, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969).

Although it is broad, § 2 is not ambiguous. *See Farrakhan*, 338 F.3d at 1016 ("Section 2 is clear"); *Hayden*, 449 F.3d at 346 (Parker, J., dissenting); *id.* at 363 (Calabresi, J., dissenting); *id.* at 368 (Katzmann, J., dissenting); *Johnson*, 405 F.3d at 1240 (Wilson, J., dissenting); *id.* at 1247 (Barkett, J., dissenting). "A statute can be unambiguous without addressing every interpretive theory offered by a party. It need only be 'plain to anyone reading the Act' that the statute encompasses the conduct at issue." *Salinas v. United States*, 522 U.S. 52, 60, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 467, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991)). As § 2 of the VRA states that "no voting qualification . . . shall be imposed . . . which results in a denial . . . of the right to vote on account of race or color . . ." and article CXX requires that a citizen not be an incarcerated felon to

be eligible to vote, it is plain that article CXX is a voter qualification which could, in certain circumstances, violate the VRA if it is construed literally.

Nevertheless, it is appropriate to consider any relevant and reliable legislative history to determine whether a literal interpretation of the broadly worded statute, would "lead to results that Congress did not intend or that are even absurd." *Hayden*, 449 F.3d at 368 (Katzmann, J., dissenting).

In *Hayden*, the majority of the Second Circuit focused on statements made in connection with pre-1982 amendments to the VRA and concluded that "Congress never intended to extend the coverage of the Voting Rights Act to felon disenfranchisement." 449 F.3d at 322. The Eleventh Circuit essentially did the same. *See Johnson*, 405 F.3d at 1232-34. However, this court agrees with Judge Robert Katzmann, who wrote in his dissent in *Hayden*:

> Because [§ 2] does not speak specifically to the question we address today, if I saw clear evidence in the authoritative legislative history that the Congress that enacted it intended to exclude felon disenfranchisement policies from its reach, I would so construe it. But when we look to the authoritative legislative history of [§ 2's] enactment in 1982—the materials directly relevant to our present inquiry, under conventional methods of statutory analysis—or even to activity in

the immediately preceding Congress, we find complete silence as to whether Congress intended to exclude felon disenfranchisement policies from its reach. Surely, the silence of enacting legislators cannot overcome the unambiguous and broadly worded provisions of a statute that was meant to apply to a multitude of state policies not specifically enumerated in its text—notwithstanding the majority's references to congressional activity in legislative sessions far removed from the Congress that enacted § 1973(a) in 1982, as well as to Congress's assumptions in enacting unrelated legislation.

I see no precedent for not following the plain language under these circumstances. What we have here cannot be that rare situation where "the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters," *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989) (internal quotations omitted), because we have literally no evidence as to the intention of the drafters of the 1982 provision specifically with respect to felon disenfranchisement policies. Moreover, because reasonable people can differ over the wisdom of extending the Act's coverage to felon disenfranchisement policies, such a result cannot be considered "absurd" or "unthinkable." *See Green v. Bock Laundry*

> *Machine Co.*, 490 U.S. 504, 527, 109 S.Ct. 1981, 104 L.Ed.2d 557 (Scalia, J., concurring). If Congress has a different view, then it is free to amend [§ 2] accordingly. But this court has no license on its own to do so.

449 F.3d at 369.

The conclusion that the VRA covers felon disenfranchisement laws is not, as defendant contends, qualified by the "clear statement rule" (or "plain statement rule"), which requires Congress to make its intent "unmistakably clear" when enacting statutes that would alter the usual constitutional balance between the federal government and the states. *Gregory v. Ashcroft*, 501 U.S. 452, 460, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991). The clear statement rule applies when Congress " 'intends to pre-empt the historic power of the States' or when it legislates in 'traditionally sensitive areas' that 'affect the federal balance.' " *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 543, 122 S.Ct. 999, 152 L.Ed.2d 27 (2002) (*quoting Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989)).

The clear statement rule does not apply in the instant case for two reasons. First, the rule does not apply when the contested statute is not ambiguous. *See, e.g., Salinas*, 522 U.S. at 60. As described earlier, § 2 is not ambiguous.

In addition, the clear statement rule does not apply because the VRA did not alter the usual balance of power between the states and the federal government. Rather, as Judge Parker wrote in his dissent in *Hayden*, "the seismic shift created by the Fourteenth and Fifteenth Amendments clearly altered the federal-state balance in an attempt to address a truly compelling national interest—namely, reducing racial discrimination perpetuated by the states. Indeed, these Amendments 'were specifically designed as an expansion of federal power and an intrusion on state sovereignty.' " 449 F.3d at 358 (*quoting Gregory*, 501 U.S. at 468). The Fifteenth Amendment, ratified in 1870, was particularly aimed at removing from the states some of their then traditional discretion to regulate the right to vote. The 1982 amendment to the VRA, therefore, did not alter what had for more than a century been the balance of power between the states and the federal government in defining the qualifications for voting. Accordingly, the clear statement rule does not apply to the VRA.[6]

Finally, the defendant contends that if the VRA governs felon disenfranchisement laws that were not

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6. This conclusion was shared by the majority of the Second Circuit. *See Hayden* 449, F.3d at 337 (Straub, J., concurring) (joined by Sack, J.) ("We do not join in any holding that a clear statement rule applies here, as we believe such a rule . . . would be inappropriate in the voting rights context"); *Id.* at 356-59 (Parker, J. dissenting) (joined by Calabresi, J., Pooler, J., Sotomayor, J.) ("For several reasons, the clear statement rule does not apply."); *see also id.* at 369 (Katzmann, J., concurring) ("I see no precedent for not following the plain language under these circumstances").

enacted with discriminatory intent it is unconstitutional under the test described in *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). In *Boerne*, the Supreme Court explained that Congress' power to enforce the substantive guarantees of the Fourteenth Amendment can be exercised only with "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 520. As the texts of the Fourteenth and Fifteenth Amendment Enforcement Clauses are identical, the court understands that this requirement is equally applicable to the Fifteenth Amendment.

In dissenting from a decision of the Ninth Circuit not to rehear *Farrakhan en banc*, Judge Alex Kozinski expressed and explained the view that if the VRA extends to felon disenfranchisement laws that were not enacted with an intent to discriminate based on race, it may be unconstitutional under *Boerne*. *See Farrakhan v. Washington*, 359 F.3d 1116, 1122-25 (9th Cir.2004). In his dissent, Judge Kozinksi stated that Congress must identify the evil targeted by its legislation more specifically than racial discrimination generally, and target only those specific practices that Congress has documented with historical examples. *Id.* at 1121; *see also Johnson*, 405 F.3d at 1231-32; *Hayden*, 449 F.3d at 330-336 (Walker, J., concurring).

However, in *Boerne*, the Supreme Court wrote that "[i]t is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its

conclusions are entitled to much deference." *Boerne*, 521 U.S. at 536 (*quoting Katzenbach*, 384 U.S. at 641). It explained that:

> [j]udicial deference, in most cases, is based not on the state of the legislative record Congress compiles but on due regard for the decision of the body constitutionally appointed to decide. As a general matter, it is for Congress to determine the method by which it will reach a decision.

Id. at 531-32 (internal quotation marks and citation omitted).

Similar deference is owed to Congress' efforts to enforce the guarantees of racial equality under the Fifteenth Amendment. In addressing the constitutionality of the VRA, the Supreme Court has explained that in enacting it Congress recognized that in certain parts of our country the states had perpetuated "through unremitting and ingenious defiance of the Constitution" the "insidious and pervasive evil" of race-based disenfranchisement. *Katzenbach*, 383 U.S. at 309. Targeted, case-by-case efforts failed to end persistent and evolving unconstitutional practices. *Id.* at 310-11. Legislation prior to the VRA, it was found, "did little to cure the problem of voting discrimination." *Id.* at 313. Therefore, § 2 of the VRA as originally written, "broadly prohibit [ed] the use of voting rules to abridge exercise of the franchise" in every state. *Id.* at 316. In assessing the

constitutionality of this broad prohibition, it is important to recognize that Congress need not limit itself to remedying past discrimination but may also enact prophylactic legislation under the Enforcement Clauses of the Fourteenth and Fifteenth Amendments "proscribing practices that are discriminatory in effect, if not intent." *Tennessee v. Lane*, 541 U.S. 509, 520, 124 S.Ct. 1978, 158 L.Ed.2d 820 (2004).

As a result of the long and persistent pattern of racial discrimination that has been recognized by Congress and the Supreme Court, statutes addressing racial discrimination have been viewed differently than other laws for the purposes of *Boerne* analysis. As Judge Parker explained in his dissent in *Hayden:*

> Since its 1997 decision in *Boerne*, the Supreme Court has issued several decisions concerning the scope of Congress's authority to enact prophylactic legislation under § 5 of the Fourteenth Amendment. The Supreme Court has held, for example, that Congress lacked the power under § 5 to abrogate state sovereign immunity to suit for discrimination on the basis of disability, age, and religion. *See [Bd. of Tr. of the Univ. of Ala. v.] Garrett*, 531 U.S. [356, 374, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001)] (disability); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 1, 120 S.Ct. 631, __, 145 L.Ed.2d 522, __ (2000) (age); *Boerne*, 521 U.S. at 536 (religion). The Supreme Court's decisions turned on a lack of "congruence and

proportionality," *id.* at 530; in other words there was insufficient evidence of discrimination to justify federal intrusion into matters traditionally regulated by the states.

By contrast, despite any number of opportunities, the Supreme Court has never questioned the constitutionality of the VRA. Indeed, the Supreme Court has referred to it as the paradigm of appropriate remedial legislation. *See [New Dep't of Human Res. v.] Hibbs*, 538 U.S. [721, 738, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003)] (upholding the FMLA and likening it to the VRA, which the Court described as a "valid exercise[ ] of Congress' § 5 power"); *Garrett*, 531 U.S. at 373 ("The ADA's constitutional shortcomings are apparent when the Act is compared to Congress' efforts in the Voting Rights Act of 1965 to respond to a serious pattern of constitutional violations."); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 640, 119 S.Ct. 2199, 144 L.Ed.2d 575 (1999) (distinguishing the Patent Remedy Act from the VRA on account of the "undisputed record of racial discrimination confronting Congress in the voting rights cases"); *Boerne*, 521 U.S. at 518 ("[M]easures protecting voting rights are within Congress' power to enforce the

> Fourteenth and Fifteenth Amendments, despite the burdens those measures place [ ] on the States.").

See Hayden, 449 F.3d at 360-61.

Accordingly, this court does not find that *Boerne* renders the VRA unconstitutional if the VRA extends to felon disenfranchisement laws that were not enacted with discriminatory intent. Nor does *Boerne* create the kind of serious doubt concerning the constitutionality of the VRA that would require the court to construe it more narrowly than its terms suggest. *See DeBartolo*, 485 U.S. at 575.

Because this court finds that § 2 of the VRA is intended to cover felon disenfranchisement laws and is not unconstitutional as applied to them, it is necessary to decide the defendant's request for judgment on the pleadings. This claim, too, is not meritorious.

A motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) is subject to the same standard of review as that employed for a motion to dismiss for failure to state a claim under Rule 12(b)(6). *See Collier v. City of Chicopee*, 158 F.3d 601, 602 (1st Cir.1998). Accordingly, in deciding a motion for judgment on the pleadings, the court must "accept all of the non-movant's well-pleaded factual averments as true." *Rivera-Gomez v. De Castro*, 843 F.2d 631, 635 (1st Cir.1988). In order to survive such a motion, the plaintiff must set forth "factual allegations, either direct or

inferential, regarding each material element necessary to sustain recovery." *Gooley v. Mobil Oil Corp.*, 851 F.2d 513, 515 (1st Cir.1988).

Claims in a complaint need not only be possible but also plausible. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, __, 127 S.Ct. 1955, 1965, 167 L.Ed.2d 929 (2007). The plaintiff may not rest merely on "unsupported conclusions or interpretations of law." *Washington Legal Found. v. Massachusetts Bar Found.*, 993 F.2d 962, 971 (1st Cir.1993).

However, there is no heightened pleading requirement in this case alleging a violation of civil rights. *See Swierkiewicz v. Soreman N.A.*, 534 U.S. 506, 512-13, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002); *Educadores Puertorriquenos En Accion v. Hernandez*, 367 F.3d 61, 66 (1st Cir.2004). The ruling in " *Swierkiewicz* is fully applicable to all civil rights actions." *Educadores*, 367 F.3d at 66, n. 1. As the First Circuit has explained:

> *Swierkiewicz* has sounded the death knell for the imposition of a heightened pleading standard except in cases in which either a federal statute or specific Civil Rule requires that result. In all other cases, courts faced with the task of adjudicating motions to dismiss under Rule 12(b)(6) [and Rule 12(c)] must apply the notice pleading requirements of Rule 8(a)(2). Under that rule, a complaint need only include "a short and plain statement of the claim showing that the pleader is entitled to relief." This statement must "give

> the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). State of mind, including motive and intent, may be averred generally. *Cf.* Fed.R.Civ.P. 9(b) (reiterating the usual rule that "[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally"). In civil rights actions, as in the mine-run of other cases for which no statute or Federal Rule of Civil Procedure provides for different treatment, a court confronted with a Rule 12(b)(6) motion "may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984).

Educadores, 367 F.3d at 66 (footnote omitted).

With regard to the VRA, the First Circuit has noted that in view of the totality of the circumstances test required to be applied by § 2(b), "[i] t is no accident that most cases under section § 2 have been decided on summary judgment or after a verdict, and not on a motion to dismiss." *Metts v. Murphy*, 363 F.3d 8, 11 (1st Cir.2004) (*en banc*).[7] The First Circuit has advised courts

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7. Two of the three VRA felon disenfranchisement cases have been decided on motions for summary judgment. *See Farrakahn*, 338 F.3d at 1010, (summary judgment); *Johnson*, 405 F.3d at 1217 (summary judgment); *but see Hayden*, 449 F.3d at 309 (motion for judgment on the pleadings).

to be cautious in granting a motion to dismiss a § 2 claim which represents a major variant of the paradigm addressed in *Gingles*—the single member electoral district. *Id.* This caution is relevant to the instant case.

As explained earlier, § 2 of the VRA was substantially revised in 1982 to make clear that a plaintiff is not required to prove that "a contested electoral mechanism was intentionally adopted or maintained by state officials for a discriminatory purpose." *Gingles*, 478 U.S. at 35. Rather, a "results test" based on consideration of "the totality of the circumstances" provides the relevant legal standard. *Id.* The Supreme Court, interpreting § 2, has elaborated on the totality of the circumstances test, stating that a practice violates the VRA if it "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Id.* at 47. "Congress intended a broad range of factors to be taken into account" in deciding whether a violation of the VRA has been proven. *Metts*, 363 F.3d at 10. For present purposes, the court assumes that " 'a bare statistical showing of disproportionate impact on a racial minority does not satisfy the [section] 2 'results inquiry' because causation cannot be inferred from impact alone.' " *Farrakhan*, 338 F.3d at 1018 (*quoting Smith v. Salt River Agr. Impr. & Power Dist.*, 109 F.3d 586, 595 (9th Cir.1997)). However, in the context of a felon disenfranchisement law, racial bias in the criminal justice system is a relevant factor in the totality of the circumstances analysis prescribed by § 2. *Id.* at 1020.

Appendix B

In this case, the plaintiffs have alleged: (1) that article CXX has "a disproportionately adverse effect on the voting rights of African-American and Hispanic-Americans," Second Am. Comp. ¶¶ 51, 52; (2) that such disproportionate effect "is caused by, among other things, the facts that African-American and Hispanic-Americans are over-represented in the population of Massachusetts incarcerated felons," *id.*; (3) "that there exists considerable racial and ethnic bias, both direct and subtle, in the Massachusetts court system," *id.*; (4) there is a causal link between the overrepresentation of minorities in the incarcerated felon population and the racial and ethnic bias in the Massachusetts court system, *id.*; and (5) that lawmakers were aware of the possibility of bias in the Massachusetts court system prior to the passage of article CXX because of, among other things, the publication of the 1994 Final Report of the Massachusetts Commission to Study Racial and Ethnic Bias in the Courts, *id.* at ¶¶ 21-22.

The court finds that these allegations provide the required short, plain statement of plaintiffs' VRA claim. They address each element of that claim and give the defendants fair notice of it. It may be difficult for plaintiffs to prove that racial bias in the court system exists and has interacted with other cognizable factors to render the disenfranchisement of incarcerated felons in Massachusetts unlawful under the VRA. However, at this point, the court does not conclude that the plaintiffs' claim is implausible or necessarily unsupportable. Therefore, as in *Metts*, "the plaintiffs are entitled to an opportunity to develop evidence before the merits are resolved." 363 F.3d at 11.

IV. ORDER

For the reasons stated in this Memorandum, it is hereby ORDERED that:

1. The Plaintiff's Motion for Summary Judgment (Docket No. 88) is DENIED.

2. The Defendant's Motion For Summary Judgment on Count I and II (Docket No. 81) is ALLOWED.

3. The Defendant's Motion Judgment on The Pleadings on Count III (Docket No. 88) is DENIED.

4. The Defendant's Motion For Reconsideration (Docket No. 101) is DENIED.[8]

5. A Scheduling Conference will be held on October 4, 2007, at 3:00 p.m. The parties shall comply with the attached Scheduling Order.

s/ MARK L. WOLF
UNITED STATES DISTRICT JUDGE

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8. The court allowed the plaintiffs' motion to file the Second Amended Complaint without prejudice to possible reconsideration of whether it complied with the pleading requirements of Federal Rule of Civil Procedure 8(a), or whether the amendment was futile because § 2 of the VRA does not reach felon disenfranchisement laws. *See* April 20, 2007 Order. The respondent filed a motion for reconsideration on those grounds, which plaintiffs opposed. As these issues are identical to those raised in the motion for judgment on the pleadings with regard to the Second Amended Complaint, they were not addressed separately.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DENYING PETITION FOR REHEARING ENTERED SEPTEMBER 2, 2009

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 08-1569

PAUL SIMMONS; PEDRO VALENTIN; DENNIS BELDOTTI

Plaintiffs - Appellees/Cross-Appellants

v.

WILLIAM FRANCIS GALVIN,

Defendant - Appellant/Cross-Appellee

Before

Lynch, *Chief Judge*,
Torruella*, Boudin,
Lipez* and Howard,
Circuit Judges.

ORDER OF THE COURT

Entered: September 2, 2009

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* Dissenting without comment.

Appendix C

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be *denied.*

By the court:

/s/ Richard Cushing Donovan, Clerk

Supreme Court, U.S.
FILED
MAR 25 2010
OFFICE OF THE CLERK

No. 09-920

In The Supreme Court of the United States

PAUL SIMMONS, PEDRO VALENTIN, DENNIS BELDOTTI,

Petitioners,

v.

WILLIAM FRANCIS GALVIN, in his capacity as Secretary of the Commonwealth of Massachusetts,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION

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Question Presented.

In November 2000, the voters of Massachusetts amended the state Constitution to disqualify incarcerated felons from voting in state elections where qualifications are set directly by the Massachusetts Constitution, by revising the provision that already disqualified minors under the age of eighteen years, persons under guardianship, and persons convicted of corrupt election practices. Pet. App. 1a-2a, 5a-6a. A year later, the Massachusetts Legislature enacted a similar amendment to the parallel statute that establishes voting qualifications for all elections in the Commonwealth of Massachusetts. *Id.* Petitioners make no claim that these laws were passed or enacted with racially discriminatory intent or purpose. Pet. App. 9a.

The questions presented are:

1. Should the dismissal of Petitioners' claim under § 2 of the Voting Rights Act, 42 U.S.C. § 1973, be affirmed either (a) because VRA § 2 does not apply to felon disenfranchisement laws, or at least does not apply to such laws that are adopted without racial animus, or (b) on the alternative ground that Petitioners' complaint fails to allege facts plausibly suggesting that Petitioners were denied the right to vote on account of race or color rather than on account of being an incarcerated felon?

2. Did the court of appeals correctly apply the long-settled rule of law that civil, regulatory measures that are not punitive in purpose or effect do not implicate the Ex Post Facto Clause of the United States Constitution?

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Statement of the Case.

(1) Incarcerated Felons May Not Vote in Massachusetts and 47 Other States.

In 2000 and 2001, the Commonwealth of Massachusetts joined 47 other states in barring incarcerated felons from voting; only Maine and Vermont do not. Pet. 6; Pet. App. 1a-2a; 13a. Unlike in many other states, a felon who has been released from prison is no longer disqualified from voting in Massachusetts. Pet. App. 6a, 11a.

Previously, the Massachusetts Constitution disqualified minors under the age of eighteen years, persons under guardianship, and persons convicted of corrupt election practices from voting in elections for Governor, Lieutenant Governor, and State Senators or Representatives. *Id.*; Mass. Const. amend. art. 3. A Massachusetts statute established the same disqualifications for all other elections for national, state, or local officials. *See* Mass. Gen. L. c. 51, § 1.

In November 2000, the voters amended this constitutional provision to add incarcerated felons to the list of persons disqualified from voting. Pet. App. 6a. This amendment was approved by a vote of 60.3 percent voting "yes" to 33.9 percent voting "no." *Id.* 5a. In 2001, the Legislature enacted a similar amendment to the voting qualification statute. *Id.* 6a. These laws were passed after Massachusetts prisoners formed a political action committee and "attempted to organized to change the laws under which they were convicted, sentenced, and imprisoned." Pet. App. 19a; *accord id.* 3a.

(2) Petitioners' Claims of Disparate Impact.

Petitioners claimed that these Massachusetts felon disenfranchisement laws violate VRA § 2 "because the percentage of imprisoned felons who are Hispanic or African-American is higher than the percentages of those groups in the population of the state...." Pet. App. 2a. "This is a claim based purely on the allegation that" these laws have "a disparate impact on minorities by disqualifying from voting imprisoned felons." *Id.* 9a.

Petitioners "made no allegation that the Commonwealth acted with racially discriminatory intent or purpose" in enacting its felon disenfranchisement laws, and "specifically disavowed any such claim." Pet. App. 9a. Indeed, there is no claim that Massachusetts has any history of using laws, rules, practices, tests, or devices to restrict, impede, or discourage voting by racial minorities. *Id.* 9a, 19a-20a. "Nor is there any claim that Massachusetts has defined ... disenfranchisement in terms of felonies that have higher conviction rates for minorities than for whites." *Id.* 20a.

Petitioners' complaint alleges that the Massachusetts felon disenfranchisement laws have a "disproportionately adverse effect on the voting rights of African-Americans and Hispanic Americans compared to [their] effect on the voting rights of other citizens." Pet. App. 7a. Petitioners further allege that this effect "is caused by, among other things, the facts that African-Americans and Hispanic-Americans are over-represented in the population of Massachusetts incarcerated felons, and that there exists considerable racial and ethnic bias,

both direct and subtle, in the Massachusetts court system." *Id.* Finally, they allege that these voting qualification laws "each interact with social and historical conditions to cause an inequality in the opportunities enjoyed by minority and non-minority voters to elect their preferred representatives." *Id.*

The complaint refers to and incorporates the final report of the Commission to Study Racial and Ethnic Bias in the [Massachusetts] Courts, which was issued in September 1994. Pet. App. 9a. "The report did not conclude that any race bias resulted in minority defendants being sentenced as felons," however. Pet. App. 10a n.3. The complaint refers to Commission findings regarding the under-representation of racial minorities in jury pools, a lack of qualified interpreters, and the under-representation of minorities on the Massachusetts bench and in the Massachusetts bar. *Id.* 9a-10a n.3. The Commission tried to test the hypothesis that racial and ethnic bias may influence sentencing decisions by judges, but it could not do so because the necessary data were unavailable. *Id.*

(3) The Court of Appeals Dismissed the Voting Rights Act Claim.

This action was commenced *pro se* in August 2001; counsel for plaintiffs was appointed in July 2002. Pet. 8. The original complaint was amended twice by counsel. Pet. App. 7a. Petitioners claimed that the Massachusetts felon disenfranchisement laws violate VRA § 2, the Ex Post Facto Clause of U.S. Const. Art. I, § 10, and the Equal Protection Clause in the Fourteenth Amendment to the Constitution. Pet. 8-9 & n.4; Pet. App. 11a.

In August 2007, the district court granted Respondent's motion for summary judgment on the ex post facto and equal protection claims, and denied Respondent's motion for judgment on the pleadings on the VRA claim. Pet. App. 11a. The court of appeals granted leave to appeal all three claims under 28 U.S.C. § 1292(b). *Id.* Petitioners waived their equal protection claim by not appealing the district court order dismissing it. *Id.*

The court of appeals reversed with respect to the VRA claim, and ordered that the claim be dismissed. Pet. App. 3a, 13a-41a. It explained that "[w]e think it clear from the language, history, and context of the VRA that Congress never intended § 2 to prohibit the states from disenfranchising currently incarcerated felons." *Id.* 3a.

The court began by discussing the constitutional background. *Id.* 15a-20a. It noted that "[t]he power of the states to disqualify from voting those convicted of crimes is explicitly set forth in § 2 of the Fourteenth Amendment." *Id.* 15a-16a (citing *Richardson v. Ramirez*, 418 U.S. 24, 55 (1974)). It observed that felon disenfranchisement laws are constitutional unless adopted with racially discriminatory intent, but stressed that "plaintiffs make no allegation of intentional discrimination, and on appeal they allege no constitutional violation other than the Ex Post Facto claim." *Id.* 17a (citing *Hunter v. Underwood*, 471 U.S. 222, 229 (1985)).

The court of appeals then analyzed the text of VRA § 2, codified at 42 U.S.C. § 1973. Pet. App. 20a-23a. It observed that, "under the plain terms of the statute, not every 'voter qualification is actionable

under § 2." *Id.* 21a. Only qualifications that "result[] in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" are barred by the state. *Id.* (quoting 42 U.S.C. § 1973(a)).[1] The court found that:

> [I]t is neither plain nor clear that the plaintiffs' claim fits within the text of § 2(a). For example, it is logical to understand the state law disenfranchisement of incarcerated felons as not 'resulting' in a denial 'on account of race or color' but on account of imprisonment for a felony, and thus not within the text of § 2 at all.

Pet. App. 23a.

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[1] In 1982, Congress amended VRA § 2 to read as follows:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) [42 U.S.C. § 1973b(f)(2)], as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

96 Stat. 134, 42 U.S.C. § 1973.

The court concluded that "the language of § 2 (a) is both broad and ambiguous and that judicial interpretation of a claim under the VRA may not be limited to the text of § 2(a) alone." *Id.* It observed that "[t]he Supreme Court itself, in deciding § 2 cases[,] has never resorted to plain text alone to give § 2 meaning," but instead "has commonly used legislative history." *Id.* 24a.

The court of appeals "look[ed] at the terms of the original VRA as a whole, the context, and recognized sources of congressional intent," and found "it is clear the original § 2 of the VRA of 1965 was not meant to create a cause of action against a state which disenfranchises its incarcerated felons." *Id.* 25a. Both the House and the Senate made clear their understanding that the 1965 version of VRA § 4, which bars the use of facially neutral tests or devices "with the effect of denying or abridging the right to vote on account of race or color," would not proscribe state laws that disqualify felons from voting. *Id.* 27a-28a. The court of appeals found that "the express history" reflects Congress's intent that the Voting Rights Act as a whole not apply to felon disenfranchisement laws. *Id.* 28a-29a.

It further found that the 1982 amendments to VRA § 2 "did not alter the prior understanding that the VRA did not reach the disenfranchisement of currently incarcerated felons." Pet. App. 33a. "Congress's specific purpose in amending § 2 of the VRA was to overrule certain aspects of the Supreme Court's decision in *Bolden*, which was concerned with vote dilution claims, not direct denial claims." *Id.* 34a (discussing *City of Mobile v. Bolden*, 446 U.S. 55 (1980)). In particular, "Congress aimed to reinstate

the 'results test,' which had been the rule developed in the pre-*Bolden* case law for vote dilution claims under *White*." *Id.* 35a (discussing *White v. Regester*, 412 U.S. 755 (1973)). "Nothing in the text, context, or history supports [Petitioners'] position" that VRA § 2 applies to "the disenfranchisement of currently incarcerated felons." *Id.* 33a.

Finally, the court observed that since 1982 Congress has enacted several laws that allow or direct states to remove disenfranchised felons from voter rolls. Pet. App. 37a-38a (discussing the National Voter Registration Act of 1993, 42 U.S.C. § 1973gg-6(a)(3)(B), which authorizes states to purge disenfranchised felons from voter rolls, and the Help America Vote Act of 2002, 42 U.S.C. § 1973gg-6(g)(3), which directs States to purge disenfranchised felons from voting lists for federal elections). It found that these more recent enactments are inconsistent with reading VRA § 2 to create a cause of action against the Massachusetts felon disenfranchisement laws. *Id.* 38a.

The court of appeals did not "reach the serious constitutional questions which the Commonwealth argues would be raised were we to adopt plaintiffs' construction of the statute." Pet. App. 41a. Respondent argued below that VRA § 2 must be construed as not applying to felon disenfranchisement laws that were enacted without racial animus because: (i) that result is required by the clear statement rule, since VRA § 2 is ambiguous and applying it to felon disenfranchisement laws that were enacted without racial animus would shift the constitutional balance between the States and the federal government; and (ii) that result is also

required to avoid constitutional doubt created by the absence of any congressional findings that States engaged in a pattern of disenfranchising felons in a deliberate attempt to discriminate on the basis of race or color.

Nor did the court of appeals resolve Respondent's alternative argument that Petitioners' complaint alleges no facts plausibly suggesting the Commonwealth has violated VRA § 2. Pet. App. 39a-40a. However, the court did express serious doubt as to whether Petitioners' had stated a viable VRA claim, even assuming that the statute could apply to felon disenfranchisement laws. *Id.* n.23.

(4) The Court of Appeals Affirmed Judgment Against the Ex Post Facto Claim.

With respect to Petitioners' claim under the Ex Post Facto Clause, the court of appeals affirmed the grant of summary judgment in favor of the Respondent. Pet. App. 42a-48a. It applied well-settled precedent from this Court that "[o]nly a punitive measure can violate the Ex Post Facto Clause," and that civil, regulatory measures that are not punitive in nature cannot. *Id.* 42a-43. The court of appeals then found, based on the undisputed facts, that the Massachusetts laws that disqualify incarcerated felons—which appear "not in the Commonwealth's criminal code, but rather its civil constitutional and statutory voter qualification provisions," *Id.* 44a—are civil, regulatory measures, and are not punitive in nature. *Id.* 43a-48a.

Reasons for Denying the Petition.

Further review of the first question, regarding Petitioners' claim under the Voting Rights Act, is not warranted for several reasons. First, the circuit split identified by Petitioners may soon disappear, if the Ninth Circuit grants *en banc* review in a pending action and joins with the First, Second, and Eleventh Circuits in holding that 42 U.S.C. § 1973 does not apply to felon disenfranchisement laws. Second, in any case, Petitioners failed to allege facts plausibly suggesting that the challenged Massachusetts laws violate VRA § 2. Third, the court of appeals' decision in this case is consistent with this Court's precedent regarding application of the clear statement rule and the canon of constitutional avoidance to laws enacted by Congress pursuant to its enforcement powers under the Fourteenth and Fifteenth Amendments.

Nor should the Court grant certiorari review of the second question, regarding Petitioners' claim under the Ex Post Facto clause. The decision below is consistent with the Court's well-established standard for determining whether a law is a punitive measure, and does not raise any important but unresolved federal question.

I. No Review of the Voting Rights Act Claim Is Warranted.

A. The Ninth Circuit May Join the Growing Consensus that 42 U.S.C. § 1973 Does Not Apply to Laws that Disqualify Felons From Voting.

The circuit conflict that is the main focus of the petition, *cf.* Pet. 10-11, does not warrant this Court's

review. There is an emerging consensus among the circuits that VRA § 2 does not apply to state laws that disqualify incarcerated felons from voting. Pet. App. 13a-14a. The First, Second, and Eleventh Circuits have all so held. *Id.*; *Simmons v. Galvin*, 575 F.3d 24, 30-42 (1st Cir. 2009), *petition for cert. filed*, No. 09-920 (February 1, 2010); *Hayden v. Pataki*, 449 F.3d 305, 312-329 (2nd Cir. 2006) (en banc); *Johnson v. Governor of the State of Florida*, 405 F.3d 1214, 1227-1235 (11th Cir.) (en banc), *cert. denied sub nom. Johnson v. Bush*, 546 U.S. 1015 (2005) (holding that VRA § 2 does not apply to state laws that disqualify incarcerated felons and continue to disenfranchise felons after release from prison). Only the Ninth Circuit has disagreed. Pet. 10-11. In 2003, a three-judge panel held that the VRA applies to state felon disenfranchisement laws. *Farrakhan v. Washington*, 338 F.3d 1009, 1010-20 (9th Cir. 2003) ("*Farrakhan I*").[2] Seven judges dissented from the denial of *en banc* review, and opined that the full court should have held that plaintiffs failed to state a claim under the VRA. *Farrakhan v. Washington*,

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[2] On remand, the district court granted summary judgment for the defendant after finding "that the totality of the circumstances does not support a finding that Washington's felon disenfranchisement law results in discrimination in its electoral process on account of race." *Farrakhan v. Gregoire*, 2006 WL 1889273, *9 (D. Wash. 2006), *rev'd*, 590 F.3d 989 (9th Cir. Jan. 5, 2010) ("*Farrakhan II*"), *petition for en banc review filed*, No. 06-35669 (March 5, 2010). The Ninth Circuit reversed, and ordered that summary judgment be granted for the plaintiffs. *Farrakhan II*, 509 F.3d at 1015. The panel held that (1) it was bound by *Farrakhan I*, and (2) the undisputed facts demonstrated that "racial minorities are over-represented in the felon population based upon factors that cannot be explained by non-racial reasons." *Id.* at 999-1000, 1015.

359 F.3d 1116, 1117-19 (9th Cir. 2004) (Kozinski, J., et al., dissenting from denial of *en banc* review).

This circuit split may soon disappear, however. The Ninth Circuit is considering whether to grant *en banc* review of the decision after remand in *Farrakhan II*, which would provide an opportunity to reconsider *Farrakhan I*. In an unusual order, the Ninth Circuit *sua sponte* directed the parties to "file concurrent briefs setting forth their respective positions on whether this case should be, or should not be, reheard en banc." *See* No. 06-35669, Order dated February 12, 2010. The State of Washington, in a brief filed on March 5, 2010, requested en banc review, in part because the conflicting decisions in *Simmons*, *Hayden*, and *Johnson* call into question whether *Farrakhan I* was correctly decided. If the Ninth Circuit were to grant en banc review in *Farrakhan II*, its subsequent decision could eliminate the circuit split that forms the main basis for the petition for a writ of certiorari in this case.

Moreover, *Farrakhan* has not had significant consequences so far. It appears that no court outside the Ninth Circuit has allowed a Voting Rights Act challenge to a felon disenfranchisement law to proceed, other than the district courts whose orders were on appeal in *Simmons*, *Hayden*, and *Johnson*. Even within the Ninth Circuit, only one other case has applied the *Farrakhan I* holding that a felon disenfranchisement law may be challenged under VRA § 2, and that action was dismissed on other grounds. *See Jones v. Yursa*, 2008 WL 4997604, *3-*4 (D. Idaho 2008) (while recognizing that "the Ninth Circuit has been willing to apply the VRA where felon disenfranchisement has been challenged,"

district court dismissed claim that Idaho law disqualifying felons from voting violates VRA § 2 because plaintiff did not allege that he is a member of a racial minority, and "also failed to point to any specific evidence that would support his allegation that Idaho's alternative sentencing scheme works to deny the right to vote based on race").

While it is possible that the issue presented in the first question may call for this Court's review at some later date in another case, review at this time would be premature.

B. Certiorari Review Is Inappropriate Because Petitioners Failed to Allege Facts Plausibly Suggesting a Claim.

Even if the question whether VRA § 2 applies to felon disenfranchisement laws otherwise warranted review, this case would be a poor vehicle for considering it, because the judgment of the court of appeals could be affirmed on an alternative ground. Petitioners' second amended complaint failed to allege facts plausibly suggesting that the Massachusetts voter qualification laws denied Petitioners the right to vote on account of race or color, rather than on account of the fact that they pleaded guilty to or were found guilty of committing one or more felonies and are still serving the resulting prison sentences. Pet. App. 39a-40a n.23. And "[t]his is the situation eight years after [plaintiffs] filed suit and have had discovery from defendants." Pet. App. 39a n.23.

Given the lack of any factual allegation plausibly suggesting that the challenged Massachusetts laws

interacted with racial bias in the community to disqualify voters on account of race or color, Petitioners' complaint failed to state a viable claim under VRA § 2. *See Osburn v. Cox*, 369 F.3d 1283, 1289 (11th Cir.), *cert. denied*, 543 U.S. 943 (2004) (affirming dismissal of VRA § 2 claim against Georgia's open primary system on this ground). Petitioners have the burden at the pleading stage to allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic v. Twombly*, 127 S.Ct. 1955, 1974 (2007). Federal R. Civ. P. 8(a)(2) "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 1964.

Petitioners' allegation that the Massachusetts felon disenfranchisement laws have a "disproportionately adverse effect" on African-American and Hispanic-American voters, Pet. App. 7a, would not state a claim upon which relief may be granted even if the VRA applied to such laws. *See Wesley v. Collins*, 791 F.2d 1255, 1260-1262 (6th Cir. 1986) (affirming dismissal of VRA § 2 claim against Tennessee's felon disenfranchisement law on this ground). At least five courts of appeals have held that evidence of statistical disparities alone is insufficient as a matter of law to establish a VRA § 2 claim of vote denial on account of race. *See Smith v. Salt River Project Agricultural Improvement and Power District*, 109 F.3d 586, 588-589, 595-596 (9th Cir. 1997) (rule that only land owners could vote in agricultural and power district elections held not to violate VRA, despite showing that a smaller percentage of African-American residents own land compared to whites); *Ortiz v. City of Philadelphia Office of the City Comm'rs*, 28 F.3d 306, 307-15 (3d

Cir. 1994) (state law that purged from voter lists any person who did not vote in two preceding years did not violate VRA, even though law had disproportionate impact on minority voters because more minority members than whites were inactive voters); *Salas v. Southwest Texas Junior Coll. Dist.*, 964 F.2d 1542, 1556 (5th Cir. 1992) (at-large district to elect college board members held not to violate VRA, despite showing of statistically significantly lower turnout by Hispanic voters); *Irby v. Virginia State Bd. of Elections*, 889 F.2d 1352, 1358-59 (4th Cir. 1989) (appointive school boards held not to violate VRA, despite statistical disparity between percentage of African-Americans appointed to boards compared to percentage in population); *Wesley*, 791 F.2d at 1260-1262 (allegation that Tennessee felon disenfranchisement law had disproportionate impact on African-Americans failed to state VRA claim).

"These cases stand for the principle that a bare statistical showing of disproportionate impact on a racial minority does not satisfy the § 2 'results' inquiry.' " *Salt River*, 109 F.3d at 595. Instead, "there must be some causal connection between the challenged electoral practice and the alleged [racial] discrimination that results in a denial or abridgement of the right to vote." *Ortiz*, 28 F.3d at 310. The requirement of such a causal connection follows from the language in VRA § 2 prohibiting a vote denial or dilution "on account of race or color." See *Johnson*, 405 F.3d at 1238 & n.7 (Tjoflat, J., concurring); *Salt River*, 108 F.3d at 595 n.7; *Wesley*, 791 F.2d at 1260-1261. "The mere fact that many incarcerated felons happen to be black and latino is insufficient grounds to implicate ... the Voting Rights Act." *Jones v. Edgar*, 3 F.Supp.2d 979, 981 (C.D. Ill.

1998) (dismissing VRA claim against Illinois felon disenfranchisement law on this ground); *accord Farrakhan*, 359 F.3d at 1117-1119 (Kozinski, J.) (arguing for dismissal of VRA claim against Washington law on this ground).

Nor did Petitioners allege any factual support for the further, conclusory assertion that there is a causal connection between any alleged "racial and ethnic bias ... in the Massachusetts court system" and the disqualification of incarcerated felons from voting. Pet. App. 7a.

> The most plaintiffs have suggested is that despite the self-evident racial neutrality of depriving all incarcerated felons from voting while imprisoned, there may be some causal connection between being incarcerated for felonies and their race. But the very 1994 Commission Report on which they rely concludes that no such connection was shown ... [and that] the data simply did not exist to permit the testing of the hypothesis. ... There is nothing else.

Pet. App. 39a-40a n.23. Such conclusory allegations of causation are insufficient to state a claim. *Dura Pharmaceuticals v. Broudo*, 544 U.S. 336, 347 (2005) (applying Rule 8(a)(2) pleading requirements to "causal connection" element of securities fraud claim).

Because Petitioners failed to allege facts plausibly suggesting that the Massachusetts felon disenfranchisement laws violate VRA § 2, this is not an appropriate case to review the first question.

C. The Decision Below Is Consistent with the Rules for Construing Laws Enacted Under Congress's Enforcement Powers.

Although this Court has not addressed whether VRA § 2 applies to state laws that disqualify felons from voting, the court of appeals' decision that it does not apply in the circumstances of this case is consistent with well-established rules of construction that weigh heavily in favor of the result reached by the First Circuit. Congress may only exercise its enforcement powers under the Fourteenth or Fifteenth Amendment to limit States' authority to disenfranchise incarcerated felons if Congress clearly and plainly stated its intent to do, and did so after finding there to be a pattern of unconstitutional felon disenfranchisement. Because those requirements were not met here, the court of appeals' decision was sound and no further review by this Court is needed.

The decisions by the First Circuit in this case, and by the Second and Eleventh Circuits in *Hayden* and *Johnson*, do not leave States free to disqualify criminals from voting in a deliberate attempt to disenfranchise racial minorities. If a felon disenfranchisement law were enacted with racially discriminatory intent and effect, it would violate the Equal Protection Clause. *Hunter*, 471 U.S. at 227-28, 233. There was no need for Congress to exercise its enforcement powers under the Fifteenth Amendment to prevent the passage of felon disenfranchisement laws motivated by racial animus, "as these laws are already unconstitutional under the Fourteenth Amendment." *Hayden*, 449 F.3d at 316 n.11. Furthermore, such laws would also seem to violate the Fifteenth Amendment ban on

state laws that deny the right to vote "on account of race, color, or previous condition of servitude." *Cf. United States v. Mississippi*, 380 U.S. 128 (1965) (United States Attorney General could challenge state literacy test and "good moral character" test for voting registration on ground that Mississippi adopted these laws with intent to deny right to vote on account of race or color and thus violated the Fifteenth Amendment). The Fifteenth Amendment "is self-executing." *See National Ass'n for Advancement of Colored People v. New York*, 413 U.S. 345, 350 (1973).

Thus, although construing the VRA not to apply to felon disenfranchisement laws means that in this respect the statute is narrower in scope than the Reconstruction Amendments themselves, this construction in no way undermines the constitutional prohibitions against States adopting laws to disqualify felons from voting with racially discriminatory intent or purpose. In this case, Petitioners did not allege that the Massachusetts laws were the result of deliberate racial animus. Pet. App. 2a, 9a.

1. The Clear Statement Rule.

The court of appeals' holding that VRA § 2 must be construed not to apply in the circumstances of this case is consistent with this Court's precedent regarding the "clear statement" or "plain statement" rule. *Hayden*, 449 F.3d at 323-328; *Johnson*, 405 F.3d at 1232 & n. 35. The text of 42 U.S.C. § 1973 provides no clear indication that Congress intended to shift the constitutional balance by limiting the

power of States acting without racial animus to disenfranchise felons.

"When 'Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.'" *Raygor v. Regents of University of Minnesota*, 534 U.S. 533, 543 (2002) (quoting *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989)). "This principle applies when Congress 'intends to pre-empt the historic powers of the States' or when it legislates in 'traditionally sensitive areas' that 'affec[t] the federal balance.'" *Raygor*, 534 U.S. at 543-544 (quoting *Will*, 491 U.S. at 65).

The clear statement rule applies with full force when Congress acts pursuant to its enforcement powers under the Reconstruction Amendments. *Gregory v. Ashcroft*, 501 U.S. 452, 457-64, 467-70 (1991) (holding that "plain statement" rule requires that ambiguous provision of the Age Discrimination in Employment Act, a statute enacted under § 5 of the Fourteenth Amendment, may not be construed to limit States' power to decide qualifications of judges); *see also Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 726 (2003) (requiring clear statement of intent to use enforcement power under § 5 of the Fourteenth Amendment to abrogate sovereign immunity granted by Eleventh Amendment).

There is no merit to Petitioners' suggestion that, because the Court did not discuss the clear statement rule when applying VRA § 2 to a vote dilution claim in *Chisom v. Roemer*, 501 U.S. 380 (1991), that opinion constitutes "clear Supreme

Court authority that the plain statement rule does not apply when determining coverage under § 2 of the Voting Rights Act." Pet. 19 n.6 (quoting *Baker v. Pataki*, 85 F.3d 919, 938 (2nd Cir. 1996) (Feinberg, J., for five of ten judges) (because the court was evenly divided in *Baker*, their opinions were without precedential effect; *see id.* at 921, n.2.). "[T]he unexplained silences of [the Court's] decisions lack precedential weight." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 232 (1995); *accord, e.g., United States v. Shabani*, 513 U.S. 10, 16 (1994) (questions that "merely lurk in the record" have not been resolved (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925))).

a. Section 2 of the Voting Rights Act Is Ambiguous.

"As a matter of textual analysis, it is neither plain nor clear that" VRA § 2 applies to felon disenfranchisement laws. Pet. App. 23a. "[A]s it exists today," VRA § 2(a) "forbids any 'standard, practice, or procedure' that 'results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color.'" *Northwest Austin Mun. Utility Dist. No. One v. Holder*, 129 S.Ct. 2504, 2509 (2009) ("*NAMUDNO*") (quoting 42 U.S.C. § 1973(a)). In addition, VRA § 2(b) "make[s] clear that an application of the results test requires an inquiry into 'the totality of the circumstances.'" *Chisom*, 501 U.S. at 394 (construing 42 U.S.C. § 1973(b)). Although the requirements of the clear statement rule would be "amply met" if the Voting Rights Act's "language unmistakeably include[d]" felon disenfranchisement

laws, *see Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 209 (1998), that is not the case.

The only part of VRA § 2 that Petitioners claim to be unambiguous is the phrase "voting qualification" in § 2(a). Pet. 15-16. Petitioners contend that, because Massachusetts law disqualifies incarcerated felons from voting, those laws must be subject to VRA § 2. *Id.* Only the first half of this contention is correct. As Petitioners noted below, to characterize the Massachusetts felon disenfranchisement laws "as anything other than a 'voting qualification' is to throw the concept of plain meaning out the window." Petitioners' C.A. Principal and Response Brief 18. This is why the court of appeals was right to affirm dismissal of Petitioners' claim under the Ex Post Facto clause. *See* pages 31-35, below. But VRA § 2(a) only bars a voting qualification that "results in a denial or abridgement of the right ... to vote on account of race or color." 42 U.S.C. § 1973(a). Petitioners' truncated analysis of the language of VRA § 2 is flawed, and fails to address the ambiguity in the phrase "on account of race or color."

The language of VRA § 2(a) "is both broad and ambiguous." Pet. App. 23a. "Congress's decision to retain the phrase 'on account of race or color' makes it unclear as to whether Section 2 would apply to [a State's] felon disenfranchisement provision[s], which ... appl[y] to felons without regard to race or color." *Johnson*, 405 F.3d at 1229 n.30. As the Court has observed in other contexts, "the phrase 'on account of' does not unambiguously define itself," and is susceptible of different, plausible meanings. *O'Gilvie v. United States*, 519 U.S. 79, 82 (1996) (construing Internal Revenue Code); *accord Bank of*

Am. Nat'l Trust & Savings Assoc. v. 203 North LaSalle St. Partnership, 526 U.S. 434, 449-54 (1999) (construing Bankruptcy Code).

Furthermore, the "totality of the circumstances" test in VRA § 2(b) "is exceptionally vague. [The statutory language provides] almost no guidance as to what illegally lessens the opportunity to vote." *Goosby v. Town Bd. of Town of Hempstead, N.Y.*, 180 F.3d 476, 500 (2nd Cir. 1999) (Leval, J., concurring); *accord Smith v. Boyle*, 144 F.3d 1060, 1063 (7th Cir. 1988) (§ 2(b) is a "notably vague standard"); *see also League of United Latin American Citizens v. Perry*, 548 U.S. 399, 426 (2006) ("The general terms of the statutory standard 'totality of circumstances' require judicial interpretation."). Since VRA § 2(a) cannot be construed in isolation from § 2(b), *see Chisom*, 501 U.S. at 394, the scope of section 2 as a whole is not at all clear from the statutory text.

b. Applying VRA § 2 Here Would Shift the Constitutional Balance.

Interpreting the VRA to apply in the circumstances of this case, *i.e.* to limit felon disenfranchisement laws that were *not* adopted with racially discriminatory intent, would alter the existing constitutional balance of power between the federal government and the States, and thus the clear statement rule applies. *See Hayden*, 449 F.3d at 326-328; *Johnson*, 405 F.3d at 1232 & n. 35. There is no merit to Petitioners' surprising assertion that the clear statement rule does not apply in the voting rights context because "[t]he very purpose of the Fifteenth Amendment ... was to strip the [S]tates

of their power to regulate voting" and give that power instead to Congress. Pet. 19 n.6.

"No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices." *NAMUDNO*, 129 S.Ct. at 2519 (Thomas, J., concurring in part and dissenting in part) (quoting *Oregon v. Mitchell*, 400 U.S. 112, 125 (1970) (Black, J., announcing the judgment of the Court)). "[T]he authority of the people of the States to determine the qualifications of their most important government officials . . . lies at 'the heart of representative government.' " *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991) (quoting *Bernal v. Fainter*, 467 U.S. 216, 221 (1984)). "It is a power reserved to the States under the Tenth Amendment and guaranteed them by that provision of the Constitution under which the United States 'guarantee[s] to every State in this Union a Republican Form of Government.' " *Id.* (quoting U.S. Const., Art. IV, § 4).

The Court has long upheld States' authority to prescribe reasonable voter qualifications that included disenfranchisement for conviction of particular crimes. *See, e.g., Romer v. Evans*, 517 U.S. 620, 634 (1996) (precedent that States may disenfranchise convicted felons is "unexceptionable"); *Lassiter v. Northampton Elec. Bd.*, 360 U.S. 45, 51 (1959) (like residence and age, "criminal record" is an "obvious" factor that "a State may take into consideration in determining the qualifications of

voters"); *Gray v. Sanders*, 372 U.S. 368, 380 (1963) ("[m]inors, felons, and other classes may be excluded" from voting).

There is no merit to Petitioners' assertion that the Reconstruction Amendments already bar all "racially discriminatory felon disenfranchisement laws," and that therefore applying VRA § 2 on the facts of this case would not alter the constitutional balance. Pet. 18 n.6. The notion that the Fourteenth or Fifteenth Amendment would bar the Massachusetts felon disenfranchisement laws even if VRA § 2 did not is false. Since Petitioners make no claim that the challenged Massachusetts laws were adopted with racially discriminatory intent, but allege merely that they result in a racially disproportionate impact, those laws are constitutionally permissible regulations of voting qualifications.

"The power of the states to disqualify from voting those convicted of crimes is explicitly set forth in § 2 of the Fourteenth Amendment." Pet. App. 15a. The States' "exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment," and thus as a general matter felon disenfranchisement laws do not violate equal protection. *Richardson*, 418 U.S. at 54-56. Indeed, the Equal Protection Clause even allows States to enforce a felon disenfranchisement law "that produces disproportionate effects along racial lines," unless the law was adopted with "racially discriminatory intent or purpose." *Hunter*, 471 U.S. at 227-28, 233. Similarly, "racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation." *Bolden*, 446 U.S. at 62.

Thus, applying the VRA to the circumstances of this case would necessarily alter the constitutional balance.

c. Congress Provided No Clear Statement That the Voting Rights Act Was Intended to Restrict the Power of States to Disenfranchise Felons.

Since the VRA contains no express mention of felon disenfranchisement laws, and indeed the legislative history reflects an intent that the VRA not apply in these circumstances, "Congress unquestionably did not manifest an 'unmistakably clear' intent to include felon disenfranchisement laws under the VRA." *Hayden*, 449 F.3d at 328 (quoting *Gregory*, 501 U.S. at 460).

The legislative history indicates that Congress intended that: (1) the 1982 amendment to VRA § 2 be construed consistently with very similar language appearing in the 1965 version of VRA § 4; and (2) this language, as first appearing in the 1965 version of VRA § 4, does not encompass state laws that disqualify felons from voting. *See* S. Rep. No. 97-417, at 27-28, n.109 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 205-6 n.109 (discussing meaning of the "results test" established by revised VRA § 2, and noting that "[t]he same use of 'on account of race or color' is made in a different context in Section 4(a)"); S. Rep. No. 89-162, at 24 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2508, 2562 (stating that VRA § 4 "would not result in the proscription of the frequent requirement of States and political subdivisions that an applicant for voting or registration for voting be

free of conviction of a felony or mental disability"); H. Rep. No. 89-439, at 25-26 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2457 (similarly stating that VRA § 4 would not "proscribe a requirement of a State or any political subdivision of a State that an applicant for voting or registration for voting be free of conviction of a felony or mental disability").

"[C]onsidering the prevalence of felon disenfranchisement [provisions] in every region of the country since the Founding, it seems unfathomable that Congress would silently amend the Voting Rights Act [in 1982] in a way that would affect them." *Hayden*, 449 F.3d at 317 (quoting *Johnson*, 405 F.3d at 1234). The explicit constitutional reservation of state power to disenfranchise felons protects a "practice . . . of ancient origin" that has always been followed by the vast majority of States. *Hayden*, 449 F.3d at 316-317. For example, when the Fourteenth Amendment was ratified in 1868, 29 of the 36 States "had provisions in their constitutions [that] prohibited, or authorized the legislature to prohibit, exercise of the franchise by persons convicted of felonies or infamous crimes." *Richardson*, 418 U.S. at 48. "Today, likewise, every state except Maine and Vermont disenfranchises felons." *Hayden*, 449 F.3d at 317. "[I]t is unlikely that Congress would have invalidated such laws—which have been widely-used since the origins of the Republic—without any discussion of the matter." *Id.* at 317 n.13.

In sum, because the result reached by the court of appeals was required by the clear statement rule, certiorari review of Petitioners' VRA claim is not warranted.

2. The Canon of Constitutional Avoidance Applies Because Congress Made No Findings of a Pattern of Unconstitutional Felon Disenfranchisement.

The court of appeals' holding is also consistent with the rule that an ambiguous statute should be interpreted in a manner that will avoid constitutional doubt. The text of VRA § 2 is ambiguous and can reasonably be construed not to apply to state laws that disenfranchise individuals on account of their being an incarcerated felon. Pet. App. 23a; *see also* pages 19-21 above. Because Congress never identified any history or pattern of States unconstitutionally disenfranchising felons, it would raise grave constitutional problems to construe VRA § 2 as applying to felon disenfranchisement laws that were adopted with no racially discriminatory intent. *Hayden*, 449 F.3d at 331, 334-36 (Walker, J., concurring); *Johnson*, 405 F.3d at 1231-32; *Farrakhan*, 359 F.3d at 1121-1125 (Kozinski, J., et al., dissenting from denial of *en banc* review).

The First Circuit noted that by ruling as it did it had "no need to reach the serious constitutional questions which the Commonwealth argues would be raised were we to adopt [Petitioners'] construction of the statute." Pet. App. 41a. Where, as here, "a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *Jones v. United States*, 529 U.S. 848, 857 (2000) (quoting *United States ex rel. Attorney General v. Delaware &*

Hudson Co., 213 U.S. 366, 408 (1909)). This canon of constitutional avoidance "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381-82 (2005). This canon applies when construing the Voting Rights Act. *See Miller v. Johnson*, 515 U.S. 900, 926-27 (1995).

The constitutional problem that would arise from applying the VRA § 2 to felon disenfranchisement laws is the lack of Congressional findings that such laws have been used to disenfranchise voters on account of race. "[P]rophylactic legislation designed to enforce the Reconstruction Amendments must 'identify conduct transgressing the ... substantive provisions' it seeks to enforce and be tailored 'to remedying or preventing such conduct.'" *NAMUDNO*, 129 S.Ct. at 2524-25 (quoting *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 639 (1999)). "Congress must establish a 'history and pattern' of constitutional violations to establish the need for" provisions in the Voting Rights Act or any other legislation "that pushes the limits of its constitutional authority" to enforce the Fourteenth or Fifteenth Amendment. *Id.* at 2525 (quoting *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 (2001)).[3] Thus, "as broad as the congressional

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[3] Congress may not be required to make such findings in cases "where the targeted constitutional wrong is self-evident." *Laro v. New Hampshire*, 259 F.3d 1, 8 n.4 (1st Cir. 2001). But this is not such a case. Petitioners do not allege that the Massachusetts felon disenfranchisement laws were adopted

enforcement power is, it is not unlimited." *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) (quoting *Oregon v. Mitchell*, 400 U.S. at 128 (Black, J., announcing the judgment of the Court)).

The Court struck down the portion of the 1970 amendment to the VRA that required States to lower their minimum voting age to 18 years for state and local elections, on the ground that this provision exceeded congressional Reconstruction Amendment enforcement powers because "Congress made no legislative findings that 21 year old requirement was used by the States to disenfranchise voters on account of race." *Mitchell*, 400 U.S. at 130-32 (Black, J.); *accord id.* at 212-13 (Harlan, J., concurring in judgment); *id.* at 295-96 (Stewart, J., joined by Burger, C. J., and Blackman, J., concurring in judgment). "Securing the right to vote for 18-year-olds required passage of the Twenty-Sixth Amendment in 1971." *Farrakhan*, 359 F.3d at 1122 (Kozinski, J.).

Given the holding in *Mitchell*, it would be highly problematic at best to construe the current VRA § 2 as applying to state laws that disqualify voters younger than the age of 18. One could imagine a lawsuit in which a plaintiff alleged that a state law disqualifying 17 year olds from voting has a "disproportionately adverse effect on the voting rights of African-Americans and Hispanic Americans compared to its effect on the voting rights of other citizens," just as Petitioners claimed here regarding

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with an intent to deny or abridge the right to vote on the basis of race, "or of any history by Massachusetts of intentional discrimination against minority voters." Pet. App. 2a; *see also id.* 9a, 17a, 26a.

the Massachusetts felon disenfranchisement laws. Pet. App. 7a. But it would surely be inconsistent with the holding in *Mitchell* to construe VRA § 2 as encompassing such a claim. If Congress cannot explicitly regulate minimum age requirements for voting in State elections without first finding that such rules have been used to disenfranchise voters on account of race, as the Court held in *Mitchell*, then Congress cannot do so implicitly through the 1982 amendment to VRA § 2. Nor would it do violence to the plain language of the statute to construe VRA § 2 as not applying to State laws that disqualify persons younger than 18 years of age from voting. Although such laws establish age as a "voting qualification or prerequisite to voting," they do not do so "in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973.

The same is true here. "As was the case in *Mitchell*, when Congress enacted the VRA and its subsequent amendments, there was a complete absence of congressional findings that felon disenfranchisement laws were used to discriminate against minority voters." *Johnson*, 405 F.3d at 1231. "Because the application of the VRA to felon-disenfranchisement statutes would not be a response to specific, identified, unconstitutional wrongdoing, it cannot be congruent and proportional," and thus would exceed Congress's powers under the Fourteenth and Fifteenth Amendments. *Hayden*, 449 F.3d at 335-36 (Walker, J., concurring).

Plaintiffs' only nod to *Oregon v. Mitchell* is to quote Justice Stewart's observation that Congress

was not required to find that "literacy tests unfairly discriminate against Negroes in every State in the Union" before barring literacy tests nationwide. Pet. 27 (quoting *Mitchell*, 400 U.S. at 284 (Stewart, J., concurring in part and dissenting in part)). But this statement in no way supports' Petitioners' suggestion that Congress could ban either literacy tests or felon disenfranchisement laws without making "an express Congressional finding of past racial discrimination." Pet. 27. To the contrary, Justice Stewart's point was that the 1965 Congress had made specific findings that literacy tests had been used in multiple States to engage in a pattern of unconstitutional denial of the right to vote based on race, and that those findings "would have supported a nationwide ban on literacy tests." *Mitchell*, 400 U.S. at 284. Similarly, Justice Black explained that the reason why Congress could ban literacy tests in 1970 was that it made "a finding ... that literacy tests have been used to discriminate against voters on account of their color," based on evidence of "a long history of the discriminatory use of literacy tests to disfranchise voters on account of their race." *Id.*, 400 U.S. at 117, 132 (Black, J., announcing the judgment of the Court).

"There is, quite simply, no evidence in the record before Congress of a history and pattern of invidious felon disenfranchisement by the states." *Hayden*, 449 F.3d at 331 (Walker, J., concurring). Thus, "no basis exists to conclude that felon-disenfranchisement statutes ... are part of the history and pattern of unconstitutional discrimination that the VRA was targeting." *Id.* at 334. In the absence of such findings, Congress lacked the power under the Reconstruction

Amendments to revise the VRA to apply to felon disenfranchisement laws that were not adopted with discriminatory intent and that would thus pass muster under the Fourteenth and the Fifteenth Amendments.

In sum, because the result reached by the court of appeals was also required by the need to construe VRA § 2 so as to avoid constitutional doubt, certiorari review of Petitioners' VRA claim is not warranted.

II. No Review of the Ex Post Facto Claim Is Warranted.

Petitioners' claim under the Ex Post Facto Clause also does not merit certiorari review. The court of appeals properly stated and applied the correct legal standard in deciding this claim. Pet. App. 42a-48a. Petitioners disagree with inferences drawn by the First Circuit from the undisputed material facts, but do not identify any unresolved and important federal question that warrants certiorari review. Pet. 29-30.

The court of appeals correctly held that "[o]nly a punitive measure can violate the Ex Post Facto Clause," Pet. App. 43a (citing *Smith v. Doe*, 538 U.S. 84, 92 (2003)), and that, where a legislative body intended to enact a civil regulatory scheme, "courts must further inquire whether "the statutory scheme was so punitive either in purpose or effect as to negate that intention," Pet. App. 45a (quoting *United States v. Ward*, 448 U.S. 242, 248-49 (1980)). The court also correctly applied the well-established rule that " 'only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty,"

id. (quoting *Hudson v. United States*, 522 U.S. 93, 100 (1997), quoting in turn *Ward*, 448 U.S. at 249); *accord Smith*, 538 U.S. at 92. Finally, the court of appeals correctly held that allegations of punitive purpose or effect should be determined by applying "the non-exclusive factors test" set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). Pet. App. 46a (citing *Smith*, 538 U.S. at 97).

Petitioners argue that the middle step, regarding application of the "clearest proof" standard, broke new ground and warrants certiorari review. Pet. 11, 28-31. They mistakenly assert that: (i) the Court has never determined whether "the 'clearest proof' standard" for assessing punitive purpose or effect applies "in the absence of a plain statement by the legislature of civil regulatory intent...," Pet. 11; (2) has only applied that standard where "a legislative body has stated its intention to enact a civil regulatory scheme," Pet. 28; and (3) should grant certiorari review to decide whether the same standard applies where such legislative intent can be inferred but was not "clearly-stated," Pet. 30. Petitioners misrepresent this Court's holdings.

In fact, the Court has repeatedly held that the "clearest proof" standard for overriding legislative intent that a measure be civil in nature applies whether that intent is stated expressly or is implied by the text, context, and structure of the enactment. *Smith*, 538 U.S. at 93 ("The courts 'must first ask whether the legislature, in establishing the penalizing mechanism, indicated either expressly *or impliedly* a preference for one label or the other.'" (emphasis added, quoting *Hudson*, 522 U.S. at 99)) (describing standard for determining whether

enactment is civil or punitive for purposes of applying Ex Post Facto Clause); *accord United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362 (1984) (same when applying Double Jeopardy Clause); *Ward*, 448 U.S. at 248 (same when applying Fifth Amendment's guarantee against compulsory self-incrimination). "Whether a statutory scheme is civil or criminal 'is first of all a question of statutory construction.' We consider the statute's text and its structure to determine the legislative objective." *Smith*, 538 U.S. at 92 (citations omitted) (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)).

The Court has already determined that, in addition to the statutory language, "[o]ther formal attributes of a legislative enactment, such as the manner of its codification or the enforcement procedures it establishes, are probative of the legislature's intent" to pass a regulatory rather than a punitive measure *Smith*, 538 U.S. at 94; *accord Hendricks*, 521 U.S. at 361 (State's "objective to create a civil proceeding is evidenced by its placement of the Act within the [State's] probate code, instead of the criminal code" (citations omitted)).

Consistent with *Smith* and *Hendricks*, the court of appeals held that the intent that the Massachusetts felon disenfranchisement laws be part of "a civil regulatory scheme" is demonstrated by the undisputed facts that those laws are part of "its civil constitutional and statutory voter qualification provisions" and are "enforced civilly, not criminally." Pet. App. 44a-45a.

Although Petitioners disagree with the inferences that the court of appeals drew from these undisputed facts, that disagreement does not warrant review by this Court. Petitioners note that the Acting Governor stated at a press conference that "[p]rison is supposed to mean punishment, not some opportunity to form a political group," when he proposed a constitutional amendment to disenfranchise *all* persons incarcerated on account of a criminal conviction, including misdemeanants as well as felons. Pet. 6-7. That proposal "was never in fact acted on by the legislature." Pet. App. 42a; *see also id.* 4a. Petitioners nonetheless argue that statements by the Acting Governor are "a clear manifestation of punitive intent" that "should have marked the end of the First Circuit's inquiry." Pet. 30. The court of appeals disagreed, finding that the information provided to voters regarding the proposed constitutional amendment to disenfranchise incarcerated felons "made no mention of any goal of punishing prisoners." Pet. App. 45a; *see also id.* 4a, 48a. The court of appeals was not required to find that "isolated statements" by the Acting Governor, or by individual legislators, demonstrated that the voters acted with punitive intent. *Cf. Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 855 n.15 (1984) ("several isolated statements" by legislators held insufficient to establish that Congress had "punitive intent").

Finally, Petitioners say that they "take issue with" the court of appeals' "analysis of the *Mendoza-Martinez* factors," Pet. 30 n.7, but do not suggest that the First Circuit's application of those factors to the particular facts of this case warrants certiorari

review. The court of appeals' application of those factors was thoughtful and, as the First Circuit made clear, consistent with this Court's prior decisions. *See* Pet. App. 46a-48a.

In sum, Petitioners have not identified any unresolved question of federal law raised by their ex post facto claim that would warrant certiorari review. Petitioners may disagree with the dismissal of their ex post facto claim, but that disagreement is based on nothing more than an assertion that the court of appeals misapplied a well-settled rule of law. It would not be appropriate to grant certiorari to review the court of appeals' application "of a properly stated rule of law" to the facts of this particular case. *See* Sup. Ct. R. 10; *accord United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant certiorari to review evidence and discuss specific facts.").

Conclusion.

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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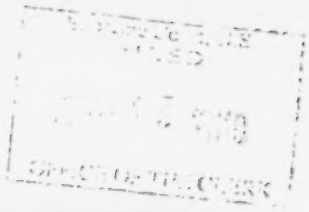

No. 09-920

In the Supreme Court of the United States

PAUL SIMMONS, ET AL., PETITIONERS

v.

WILLIAM FRANCIS GALVIN, SECRETARY OF THE COMMONWEALTH OF MASSACHUSETTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973, applies to state felon disenfranchisement laws that result in discrimination on the basis of race.

2. Whether the Massachusetts felon disenfranchisement scheme established in 2000 violates the Ex Post Facto Clause of the United States Constitution as applied to those Massachusetts felons who were incarcerated and yet were able to vote prior to 2000.

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In the Supreme Court of the United States

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PAUL SIMMONS, ET AL., PETITIONERS

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WILLIAM FRANCIS GALVIN, SECRETARY OF THE COMMONWEALTH OF MASSACHUSETTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. Until 2000, incarcerated felons were permitted to vote by absentee ballot in elections in the Commonwealth of Massachusetts. In 2000, the state legislature approved a proposal to amend the state constitution to forbid incarcerated felons from voting. Pet. App. 3a-4a. The proposed amendment, Article 120, was submitted to Massachusetts voters along with a voter guide explaining the rationale underlying the proposal:

> When someone in Massachusetts is sentenced to jail for committing a felony, we deprive them of their

> liberty and right to exercise control over their own lives, yet current law allows these same criminals to continue to exercise control over our lives by voting from prison. This amendment will change the law that gives jailed criminals the right to vote.

Id. at 4a.

Massachusetts voters approved Article 120 by a 60.3% vote, and the amendment took effect on December 6, 2000. Pet. App. 5a. As amended, the Massachusetts Constitution provides that "[e]very citizen of eighteen years of age and upwards, *excepting persons who are incarcerated in a correctional facility due to a felony conviction*, and excepting persons under guardianship and persons temporarily or permanently disqualified by law because of corrupt practices in respect to elections * * * shall have a right to vote" in certain state elections. *Id.* at 6a (quoting Mass. Const. Amend. Art. III).

The following year, the Massachusetts legislature extended the ban on voting by incarcerated felons in Chapter 150 of the Acts of 2001. Under Chapter 150, the voting ban applies to all elections in Massachusetts. Pet. App. 6a; see 2001 Mass. Acts ch. 150, 375.

2. In 2001, petitioners, who are Massachusetts residents serving terms of imprisonment following convictions for felonies committed before Article 120's effective date, filed suit challenging Article 120, as well as its extension in Chapter 150. Pet. App. 6a-7a.

Petitioners claimed, among other things, that Article 120 violates Section 2 of the Voting Rights Act of 1965 (VRA), 42 U.S.C. 1973. Section 2(a) of the VRA, as amended in 1982, prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure * * * which results in a denial or abridgement of the right of any citizen of the United States to vote on

account of race or color" or membership in a language minority group. 42 U.S.C. 1973(a); see 42 U.S.C. 1973b(f)(2). Section 2(b), which was added in 1982, provides that Section 2(a) is violated when, "based on the totality of circumstances, it is shown that * * * members of a class of citizens protected by [Section 2(a)] * * * have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. 1973(b). Petitioners alleged that Article 120 violates Section 2 because it "has a disproportionately adverse effect on the voting rights of African-Americans and Hispanic-Americans" that "is caused by, among other things, the facts that African-Americans and Hispanic-Americans are over-represented in the population of Massachusetts incarcerated felons, and that there exists considerable racial and ethnic bias, both direct and subtle, in the Massachusetts court system." Second Am. Compl. ¶ 51; see Pet. App. 6a.

Petitioners also alleged that Article 120 was a "punitive measure" that violated the Ex Post Facto Clause, U.S. Const. Art. I, § 10, as applied to convicted felons who committed their offenses before Article 120's effective date. Pet. App. 10a.

3. The district court denied the Commonwealth's motion for judgment on the pleadings with respect to petitioner's VRA claim, but granted summary judgment in favor of the Commonwealth on petitioners' Ex Post Facto claim. Pet. App. 108a-152a.

With respect to petitioners' VRA claim, the district court reasoned that Section 2(a) of the VRA "expressly covers all voting qualifications without any stated (or suggested) exemption for felon disenfranchisement laws." Pet. App. 137a-138a. The court further con-

cluded that petitioners had adequately alleged that "racial bias in the court system exists and has interacted with other cognizable factors to render the disenfranchisement of incarcerated felons in Massachusetts unlawful under the VRA." *Id.* at 151a.

The district court concluded, however, that petitioners' Ex Post Facto claim failed because Article 120 does not retroactively impose an additional penalty for crimes they committed before the constitutional amendment was passed. Pet. App. 117a-129a.

4. The court of appeals reversed the district court's denial of the Commonwealth's motion for judgment on the pleadings as to the VRA claim, but affirmed the district court's grant of summary judgment in favor of the Commonwealth on the Ex Post Facto claim. Pet. App. 1a-49a.

Noting that "Article 120 is among the narrowest of state felon disenfranchisement provisions" because it prevents only currently incarcerated felons from voting, Pet. App. 13a, the court of appeals concluded that it is "clear from the language, history, and context of the VRA that Congress never intended § 2 to prohibit the states from disenfranchising currently incarcerated felons," *id.* at 3a.

The court of appeals began by noting that "the state's denial of the right to vote to felons has a constitutional grounding" in Section 2 of the Fourteenth Amendment, Pet. App. 16a, which provides for reduced representation when a State denies or abridges the right to vote, "except for participation in rebellion, or other crime," U.S. Const. Amend. XIV, § 2. Petitioners, the court noted, "make no allegation of intentional discrimination, and * * * allege no constitutional violation" under the Equal Protection Clause. Pet. App. 17a.

The court of appeals rejected petitioners' argument that the plain text of Section 2 reached their claim. The court considered it "neither plain nor clear" that the disenfranchisement of incarcerated felons is properly understood as "'resulting' in a denial 'on account of race or color'" within the meaning of Section 2(a), as opposed to "on account of imprisonment for a felony." Pet. App. 23a. The court then held that Section 2(b), which sets forth the test for determining when a Section 2 violation "is established," 42 U.S.C. 1973(b), affirmatively "undercuts" petitioners' Section 2 claim. Pet. App. 36a. The court explained that Section 2(b) "protects a 'class of citizens' who by law may and should enjoy as full an 'opportunity [as] other members of the electorate to participate in the political process,'" *ibid.* (quoting 42 U.S.C. 1973(b)), whereas, "[f]or a host of valid reasons, incarcerated prisoners cannot participate in the political process equally with free citizens outside the prison walls," *id.* at 36a-37a.

The court of appeals also noted that Congress enacted the VRA "against the background of explicit constitutional and congressional approval of state felon disenfranchisement laws," Pet. App. 25a (footnote omitted), and that congressional action both before and after the 1982 amendments suggested congressional acceptance of those laws, *id.* at 30a-32a, 37a-38a. In light of that history, the court concluded that Congress did not intend the VRA to "reach the disenfranchisement of currently incarcerated felons." *Id.* at 33a.

Having reached that conclusion, the court of appeals declined to address "what is needed to prove a denial * * * claim under § 2 which is not a claim against a state provision disenfranchising imprisoned felons." Pet. App. 39a-40a; see *id.* at 41a ("[T]his is not the case

in which to test the standards for other types of purported direct disenfranchisement claims."). The court also noted that "[i]t is doubtful plaintiffs have articulated a viable § 2 direct denial theory, in any event," since "[t]he most [petitioners] have suggested is that * * * there may be some causal connection between being incarcerated for felonies and their race," but petitioners had provided no support for that proposition after several years of litigation. *Id.* at 39a n.23.

Turning to the Ex Post Facto claim, the court concluded that Article 120 was intended as a "civil regulatory scheme," rather than as punishment for crime. Pet. App. 44a. The court noted that Article 120's language, nature, and placement in the State's civil voter qualification provisions, rather than its criminal code, all indicate that Article 120 was intended as a civil regulation, rather than a criminal penalty. *Id.* at 44a-45a. After considering the factors set forth in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963), the court concluded that petitioners had failed to meet their burden of establishing by "the clearest proof" that Article 120 is "so punitive either in purpose or effect as to negate that intention." Pet. App. 45a (internal quotation marks and citations omitted); *id.* at 46a-48a.

Judge Torruella dissented. Pet. App. 50a-107a. In his view, the court erred in ordering dismissal of petitioners' VRA claim because the "felon disenfranchisement provision at issue is clearly a 'voting qualification'" within the meaning of Section 2, and "[w]hether or not this provision results in the denial of the right to vote 'on account of race or color' under the 'totality of the circumstances' remains the ultimate question for the trier of fact." *Id.* at 53a. Judge Torruella also criticized the court's reliance on "assorted evidence of the widespread

use and general sanction of felon disenfranchisement laws in various contexts," noting that none of the evidence supports the conclusion that "Congress intended to insulate such laws from scrutiny under § 2 of the VRA where they are alleged to effect a discriminatory result." *Id.* at 66a. Finally, Judge Torruella concluded that Article 120 is punitive, and thus violates the Ex Post Facto Clause. *Id.* at 77a-107a.

DISCUSSION

Neither of the questions presented warrants this Court's review. There is no conflict between the court of appeals' decision and final decisions from other circuits. With respect to the first question presented, while the decision is in tension with a recent decision of the Ninth Circuit, the Ninth Circuit has granted en banc review in that case. At least until the en banc Ninth Circuit has had the opportunity to rule, this Court's intervention would be premature. Moreover, the court of appeals correctly held petitioners' challenge to Article 120, a law that disqualifies only currently incarcerated felons from voting, is not actionable under Section 2. Finally, the limited scope of the disqualification at issue renders this case an unsuitable vehicle for considering Section 2's application to other, more restrictive, state felon disenfranchisement laws.

With respect to the second question presented, the court of appeals properly applied this Court's well-established framework for evaluating Ex Post Facto claims. Further review is unwarranted.

A. The VRA Question Does Not Warrant This Court's Review

With the passage of Article 120 in 2000, Massachusetts joined 47 other States that restrict voting by per-

sons convicted of felony offenses. Article 120, which applies only to presently incarcerated felons, is, as the court of appeals observed, "among the narrowest of state felon disenfranchisement provisions." Pet. App. 13a. Approximately two-thirds of the States disenfranchise felons both while they are incarcerated and while they are on parole, probation, or both. *Ibid.* Still other States prohibit felons from voting for life. *Ibid.*

The court of appeals in this case did not opine on these other, more restrictive, felon disenfranchisement laws. It instead concluded only that petitioners' challenge to Massachusetts's narrow disqualification provision was not actionable under Section 2. That conclusion does not warrant further review.

1. To date, the court below is the only court of appeals that has squarely addressed the cognizability of a Section 2 challenge to a state felon disenfranchisement law that applies only to currently incarcerated prisoners. The Second and Eleventh Circuits, however, have both held that Section 2 does not apply to more restrictive felon disenfranchisement laws. See *Hayden* v. *Pataki*, 449 F.3d 305, 314, 329 (2d Cir. 2006) (en banc) (rejecting Section 2 challenge to a statute disenfranchising both "currently incarcerated prisoners and parolees"); *Johnson* v. *Governor of Fla.*, 405 F.3d 1214, 1216 & n.1 (11th Cir.) (en banc) (rejecting Section 2 challenge to a statute disenfranchising felons during the period of incarceration and "until restoration of civil rights or removal of disability," brought by individuals who were "convicted of a felony and have completed all terms of their incarceration, probation, and parole"), cert. denied, 546 U.S. 1015 (2005); see also *id.* at 1234 n.40 (expressing concern that "states might lose their ability to ex-

clude felons currently in prison from the franchise" under a contrary reading of the statute).

The Ninth Circuit, on the other hand, held in *Farrakhan* v. *Washington*, 338 F.3d 1009 (2003) (*Farrakhan I*), cert. denied, 543 U.S. 984 (2004), that Section 2 applies to a Washington statute disenfranchising felons both during the period of incarceration and "until they have completed all the requirements of their sentences and have obtained certificates of discharge." *Id.* at 1012, 1016. The court denied a rehearing petition over the objection of seven judges, 359 F.3d 1116 (2004) (Kozinski, J., dissenting from denial of rehearing), and the case was remanded to the district court for further consideration.

On remand, the district court granted summary judgment in favor of the State. *Farrakhan* v. *Gregoire*, No. CV-96-076, 2006 U.S. Dist. LEXIS 45987, at *28-*29 (D. Wash. July 7, 2006). A divided panel of the Ninth Circuit reversed. Considering itself "bound by *Farrakhan I's* holding that § 2 of the VRA applies to Washington's felon disenfranchisement law," the court invalidated the law based on plaintiffs' showing that "racial minorities are over-represented in the felon population based upon factors that cannot be explained by non-racial reasons." *Farrakhan* v. *Gregoire*, 590 F.3d 989, 999-1000, 1015-1016 (9th Cir. 2010) (*Farrakhan II*).

In so holding, the Ninth Circuit noted that Washington had recently amended its disenfranchisement statute to provisionally restore the voting rights of felons upon their release from prison or from community custody (subject to revocation for "willful failure to fulfill all financial obligations imposed as part of [the] sentence"). *Farrakhan II*, 590 F.3d at 1015. The court concluded, however, that the amendment "d[id] not alter [the] anal-

ysis." *Id.* at 1016. The court explained that, "no matter how well the amended law functions to restore at an earlier time the voting rights of felons who have emerged from incarceration, it does not protect minorities from being denied the right to vote upon conviction by a criminal justice system that Plaintiffs have demonstrated is materially tainted by discrimination and bias." *Ibid.*

As petitioners note (Pet. 24-25), the Ninth Circuit's reasoning in *Farrakhan II* is in substantial tension with the court of appeals' conclusion in this case that Section 2 does not invalidate laws that disqualify only currently incarcerated felons from voting. This Court's intervention is not, however, warranted at this time because the Ninth Circuit has agreed to rehear the case en banc. *Farrakhan* v. *Gregoire*, No. 06-35669 (Apr. 28, 2010). The en banc court's decision may eliminate any conflict with the decision below, rendering this Court's intervention unnecessary. If, however, the en banc court's decision does not eliminate the conflict, the Court will likely have the opportunity to consider whether to grant review in that case.

Farrakhan, moreover, would present this Court with the opportunity to address the Section 2 question with the benefit of a fully developed record. Here, by contrast, petitioners have provided no support for their claim that "past practices in the Massachusetts criminal justice system produced inmate populations which, in combination with the disqualification of inmates imprisoned for felonies, have resulted in disproportionate disqualification of minorities from voting." Pet. App. 2a; see also *id.* at 39a n.23 (noting that "[t]his is the situation eight years after [petitioners] filed suit and have

had discovery from defendants").[1] Accordingly, at least until the en banc Ninth Circuit rules in *Farrakhan*, this Court's intervention would be premature.

2. On the merits, the court of appeals in this case reasonably concluded that petitioners' challenge to Article 120, which forbids only currently incarcerated felons from voting, is not actionable under Section 2.

As originally enacted in 1965, Section 2 of the VRA provided: "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. 1973 (1970). After this Court interpreted that language to require a showing of discriminatory purpose, see *City of Mobile* v. *Bolden*, 446 U.S. 55, 60-62 (1980), Congress amended the statute in 1982 to "restore the 'results test'—the legal standard that governed voting discrimination cases prior to" *Bolden*. *Thornburg* v. *Gingles*, 478 U.S. 30, 44 n.8 (1986). As amended, Section 2(a) prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure * * * which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or membership in a language minority group. 42 U.S.C. 1973(a); see 42 U.S.C. 1973b(f)(2). Section 2(b), which was added in 1982, provides that "[a] violation of [Section 2(a)] is established if, based on the totality of circumstances, it is shown that * * * members of a

[1] The court of appeals noted that the 1994 Final Report by the Commission to Study Racial and Ethnic Bias in the Courts to the Massachusetts Supreme Judicial Court on which petitioners relied in making this claim "did not conclude that any race bias resulted in minority defendants being sentenced as felons." Pet. App. 10a n.3.

class of citizens protected by [Section 2(a)] * * * have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. 1973(b).

A law that forbids currently incarcerated felons from voting in elections in the State, is, as petitioners emphasize (Pet. 14, 15) a "voting qualification" within the meaning of Section 2(a). But as the court of appeals noted, "it is clear that under the plain terms of the statute, not every 'voter qualification' is actionable under § 2." Pet. App. 21a. Section 2 does not invalidate all voter qualifications that may disproportionately affect members of particular groups, but rather focuses on those that have unjustified disparate effects. Article 120, a neutrally enforced and designed law that prohibits only currently incarcerated felons from voting, is not such a voter qualification. Incarceration, as this Court has often observed, entails "peculiar and restrictive circumstances," and "brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977) (quoting *Price* v. *Johnston*, 334 U.S. 266, 285 (1948)); see also, *e.g.*, *Wolff* v. *McDonnell*, 418 U.S. 539, 555 (1974) ("Lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen.").

Moreover, the language of Section 2(b), which describes the "totality of circumstances" test with a particular focus on the plaintiff's "opportunity * * * to participate in the political process," 42 U.S.C. 1973(b), is not naturally read to encompass the claims of incarcerated prisoners who, "[f]or a host of valid reasons, * * * cannot participate in the political process" in the same man-

ner as "free citizens outside the prison walls." Pet. App. 36a.[2] The necessarily restrictive nature of confinement means that prisoners are unable in many ways to fully participate in the political process. Among other limitations on their political activity, inmates may be prohibited from making unmonitored phone calls and may not go door-to-door. See *Hayden*, 449 F.3d at 342 (Jacobs, J., concurring). Moreover, the type of associational activities generally attendant to participating in the political process—meetings and discussions regarding policy issues, debates about particular candidates, attempts to persuade others to one's viewpoint—may raise particular security concerns in the prison context. See *Jones*, 433 U.S. at 132 (citing *Wolff*, 418 U.S. at 561-562).

Given the nature of penal confinement and its accompanying restrictions on a variety of rights necessary to fully participate in the political process, Section 2's general prohibition on discriminatory voting practices does not forbid a neutrally designed and enforced state provision disqualifying incarcerated felons from voting. Petitioners thus cannot demonstrate a violation of Section 2, even if they could ultimately prove that (as they have alleged) African-American and Hispanic defendants are over-represented in the population of Massachusetts incarcerated felons because of "past practices in the Massachusetts criminal justice system." Pet. 15 (quoting Pet. App. 2a); see Pet. App. 17a.

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[2] Although petitioners rely on the language of Section 2(a), see Pet. 12-14, they do not dispute that Section 2(b) sets out the relevant inquiry for evaluating their claim, see Pet. 25. The two subsections in any event cannot be read entirely in isolation from one another. See, *e.g.*, *United States* v. *Morton*, 467 U.S. 822, 828 (1984) ("We do not * * * construe statutory phrases in isolation; we read statutes as a whole.").

3. To acknowledge that Article 120 is not subject to challenge under Section 2 of the VRA does not mean, as petitioners suggest (Pet. 24-25), that all felon disenfranchisement laws, including those that can be shown to have an unjustified disparate effect on particular racial groups, are categorically beyond the reach of Section 2. The claim of a currently incarcerated plaintiff, whose imprisonment necessarily carries with it substantial restrictions on his ability to participate in the political process, differs in important ways from the claim of an individual who has fully served his sentence and returned to society. And while the nature of penal confinement suffices to justify a disenfranchisement provision for currently incarcerated felons like Article 120, a lifetime disenfranchisement provision for individuals who have fully served their sentences, for example, would raise different questions under Section 2.

Because this case specifically concerns a law that "is among the narrowest of state felon disenfranchisement provisions," Pet. App. 13a, in that it prohibits felons from voting only during the period of their incarceration, it does not provide a suitable opportunity to consider how Section 2 applies to other kinds of felon disenfranchisement laws. Such laws vary in a number of respects. Some prohibit voting both during the period of incarceration and during parole or probation. *Ibid.*; see, *e.g.*, Cal. Const. Art. 2, § 4; Cal. Election Code § 2101 (West 2003). Some prohibit some or all convicted felons from voting for life, absent a pardon or an individual restoration of rights. Pet. App. 13a; see, *e.g.*, Ky. Const. § 145; Ky. Rev. Stat. Ann. § 116.025 (LexisNexis Supp. 2009); Va. Const. Art. II, § 1. Some laws apply different restrictions depending on the crime of conviction, see, *e.g.*, Ala. Code § 15-22-36.1(g) (LexisNexis Supp. 2009);

Miss. Const. Art. 12, § 241, or the defendant's criminal history, see, *e.g.*, Ariz. Rev. Stat. Ann. § 13-912 (2010); Nev. Rev. Stat. Ann. § 213.157 (LexisNexis 2010).

4. On two earlier occasions, the United States filed briefs as amicus curiae in the courts of appeals that addressed Section 2's application to felon disenfranchisement laws. In an amicus brief filed in *Johnson* v. *Governor of Florida*, 353 F.3d 1287 (11th Cir. 2003), rev'd en banc, 405 F.3d 1214, cert. denied, 546 U.S. 1015 (2005), a challenge to a Florida law disqualifying any person convicted of a felony from voting until restoration of civil rights or removal of disability, the United States did not question Section 2's applicability to felon disenfranchisement laws generally. It took the position that a successful challenge under Section 2's results test requires not only "statistics showing that a facially-neutral practice has a racially disparate effect on minority electoral opportunities," but an inquiry into "whether the current electoral practices interact with effects of past racial discrimination to diminish minorities' 'fair chance to participate' in the electoral process." U.S. Amicus Br. 22-23, *Johnson*, *supra* (No. 02-14469).

Later, in an amicus brief filed in *Muntaqim* v. *Coombe*, 449 F.3d 371 (2d Cir. 2006) (en banc) (per curiam), which had been consolidated for briefing and oral argument with *Hayden*, *supra*, the United States addressed the question "[w]hether Section 2 of the VRA applies to [a state statute that] prohibits presently incarcerated felons from voting." U.S. Amicus Br. 5, *Muntaqim*, *supra* (Nos. 01-7260 and 04-3886).[3] The

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[3] The Second Circuit had granted en banc review to consider, *inter alia*, "[w]hether Section 2 of the Voting Rights Act can constitutionally be applied to a state statute * * * that disenfranchises persons

United States took the view that Section 2 "should not be construed as applying to such laws." *Ibid.* The United States emphasized that Section 2 of the Fourteenth Amendment expressly contemplates felon disenfranchisement laws. See U.S. Const. Amend. XIV, § 2 ("[W]hen the right to vote at any [federal] election * * * is denied to any of the male inhabitants of [a] State * * * or in any way abridged, except for participation in rebellion, or other crime, the basis of representation shall be reduced."); *Richardson* v. *Ramirez*, 418 U.S. 24, 42-43 (1974). As a consequence, the brief reasoned, "felons have no substantive 'right to vote' except as granted under state law," and therefore "the VRA's reference to standards, practices or procedures that result in a denial or abridgement of that right cannot fairly be read to include felon disenfranchisement laws." *Id.* at 9-10. The brief also argued that the VRA's legislative history demonstrated congressional acceptance of such laws, U.S. Amicus Br. at 11-15, *Muntaqim*, *supra* (Nos. 01-7260 and 04-3886), and that applying the VRA to such laws, where the laws were not motivated by intentional discrimination, would raise serious constitutional questions and would disrupt the federal-state balance in the absence of a clear statement from Congress, *id.* at 15-33.

Insofar as the reasoning of the United States' amicus brief in *Muntaqim* can be extended beyond the question to which that brief was specifically directed—namely, Section 2's application to state laws that "prohibit[] presently incarcerated felons from voting," U.S. Amicus Br. 5, *Muntaqim*, *supra* (Nos. 01-7260 and 04-3886)—

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currently incarcerated as felons and parolees." *Muntaqim* v. *Coombe*, 396 F.3d 95, 95 (2004).

such an extension would be unwarranted. As a textual matter, Section 2 of the Fourteenth Amendment, which "simply states that disenfranchised felons, unlike other persons disenfranchised by the States, are to be included within the census for purposes of apportioning representatives," Pet. App. 67a (Torruella, J., dissenting), does not support the conclusion that all persons convicted of felonies, whether currently imprisoned or returned to society after serving their sentences, have no "right to vote" that is capable of being denied or abridged within the meaning of Section 2. Neither the Second Circuit nor other courts of appeals have adopted that reading of the statute. Moreover, indications that Congress has generally acknowledged the validity of felon disenfranchisement laws do not establish that *all* felon disenfranchisement laws, including those that can be shown to have an unjustified disparate effect on particular racial groups, are categorically beyond the reach of Section 2.

For the reasons explained above, however, the United States adheres to the conclusion that neutrally designed and enforced laws prohibiting currently incarcerated felons from voting are not subject to challenge under Section 2. See pp. 12-13, *supra*. That principle is sufficient to resolve this case.

B. The Ex Post Facto Question Does Not Warrant This Court's Review

This Court's review is not warranted to address whether Article 120 violates the Ex Post Facto Clause as applied to incarcerated felons who committed their offenses before the effective date of the amendment.

1. The framework for determining whether a law "constitutes retroactive punishment forbidden by the *Ex*

Post Facto Clause" is "well established." *Smith* v. *Doe*, 538 U.S. 84, 92 (2003). The court first inquires whether "the intention of the legislature was to impose punishment." *Ibid.* If the legislature's intention was punitive, "that ends the inquiry." *Ibid.* "If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive," a court "must further examine whether the statutory scheme is 'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" *Ibid.* (quoting *Kansas* v. *Hendricks*, 521 U.S. 346, 361 (1997), and *United States* v. *Ward*, 448 U.S. 242, 248-249 (1980)) (internal quotation marks omitted; brackets in original). Because the Court "ordinarily defer[s] to the legislature's stated intent," *ibid.* (quoting *Hendricks*, 521 U.S. at 361), "'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty," *ibid.* (quoting *Hudson* v. *United States*, 522 U.S. 93, 100 (1997), and *Ward*, 448 U.S. at 249).

2. Applying that well-established framework in this case, the court of appeals concluded that Article 120 does not retroactively increase the punishment for crimes committed before its effective date. The court began by noting that, in *Trop* v. *Dulles*, 356 U.S. 86 (1958), this Court described a criminal disenfranchisement provision not enacted for the purpose of punishment as a "nonpenal exercise of the power to regulate the franchise." Pet. App. 43a-44a (quoting *Trop*, 356 U.S. at 96-97). The court observed that Article 120 "on its face" does not describe a criminal penalty, that it is "not in the Commonwealth's criminal code, but rather its civil constitutional and statutory voter qualification provisions," that it is civilly enforced, and that none of the information provided to voters in connection with the

constitutional amendment made mention of "any goal of punishing prisoners." *Id.* at 44a-45a.

Having concluded that Article 120 was intended as a "civil regulatory scheme" rather than an additional penalty for the commission of a crime, the court of appeals, after examining each of the seven factors set forth in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963), concluded that petitioners had failed to show by "the clearest proof" that Article 120 is "so punitive either in purpose or effect as to negate that intention," Pet. App. 45a (quoting *Ward*, 448 U.S. at 248-249).

3. Petitioners contend that this Court's review is warranted to address whether the "clearest proof" standard applies in the absence of "clearly-stated legislative intent to regulate." Pet. 30. This Court has, however, made clear that a legislative intent to regulate, rather than punish, need not be "clearly stated" for purposes of the threshold Ex Post Facto inquiry. This Court has described the inquiry as whether the legislature "indicated either expressly *or impliedly* a preference for one label or the other." *Hudson*, 522 U.S. at 99 (emphasis added). It has, moreover, made clear that "formal attributes of a legislative enactment," such as the placement of the enactment in the State's code, is probative of legislative intent. *Smith*, 538 U.S. at 94; see *Hendricks*, 521 U.S. at 361. The court of appeals properly relied on such evidence in concluding that Article 120 was intended to create a civil, rather than penal, scheme. See Pet. App. 44a. And in reciting the proposition that "'[o]nly the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty," *id.* at 45a (quot-

ing *Hudson*, 522 U.S. at 100), the court of appeals accurately stated the law.[4]

Petitioners rely on the separate opinions of Members of this Court who have argued that the "clearest proof" standard should not apply when legislative intent is ambiguous. Pet. App. 29 (citing *Smith*, 538 U.S. at 107 (Souter, J., concurring in the judgment), and *id.* at 115 (Ginsburg, J., dissenting)). Even were the Court to adopt that approach, however, it is not clear that it would have any effect on this case. As petitioners acknowledge (Pet. 29), the court of appeals considered petitioners' proffered evidence of punitive intent, but considered the "sporadic" statements of legislators to be both inconclusive as to intent and less probative than the "balanced debate" contained in the information provided to the voters who ultimately were responsible for Article 120's passage. Pet. App. 47a-48a. The court's opinion gives no indication either that it thought the statements on which petitioners relied were sufficient to create ambiguity about the intent underlying Article 120, or that it would have reached a different conclusion about Article 120's purpose and effect had it reviewed the *Mendoza-Martinez* factors under a different standard.

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[4] Petitioners also contend that the court of appeals "defaulted to an inappropriate presumption that what it perceived as the absence of evidence of punitive intent justified a finding of a civil regulatory scheme." Pet. 29-30. The court of appeals, however, after considering the language and nature of Article 120, concluded that Article 120 "on its face" creates a civil regulatory scheme. See Pet. App. 44a-45a. The court's observations that "there is no language indicating the Commonwealth's provision is penal," *id.* at 44a, and that the state Voter Guide "made no mention of any goal of punishing prisoners," *id.* at 45a, do not amount to a holding that the "absence of evidence of punitive intent justifie[s] a finding of a civil regulatory scheme," Pet. 29.

Petitioners contend that the court of appeals erred in its evaluation of the evidence bearing on the penal nature of Article 120. See Pet. 29-30 & n.7 ("Had the court conducted an appropriately rigorous examination, it would have found overriding punitive effect whether employing a preponderance standard or the elevated 'clearest proof' standard."). The court of appeals' case-specific evaluation of the particular circumstances surrounding the enactment of Article 120 does not merit further review. Moreover, to the extent that the Ex Post Facto question in this case presents issues that may be common to the enactment of other felon disenfranchisement laws, such issues are unlikely to be of recurring importance. The decision in this case is, notably, the only court of appeals decision addressing the validity of a newly enacted felon disenfranchisement scheme under the Ex Post Facto Clause. As such, it does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2010